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Supreme Court of the United States

October Term, 1939

No. 593

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et al., *Petitioners*,

v.

LUKENS STEEL COMPANY, a corporation, et al., *Respondents.*

BRIEF FOR RESPONDENTS

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The primary question presented is a pure question of law, viz., the proper construction of the term "locality", as employed in Section 1 (b) of the Walsh-Healey Act, which term delimits the jurisdiction or authority of the Secretary of Labor under the Act and to which petitioners either assign no meaning or, at most, a meaningless definition designed to permit the Secretary to determine her own jurisdiction, to cloak a usurpation of the power to fix wages and to obtain the same results as those obtained under a construction of the Act, now abandoned and concededly improper, which openly read the term out of the statute	30

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A. The authority of the Secretary under the Act is limited to the factual determination of minimum wages which prevail in "localities", and is conferred only to the end that each person seeking or contracting to supply goods to the Government may be required to agree to pay a minimum wage prevailing in the locality in which he is to manufacture or furnish such goods under his contract 30

B. Petitioners in their brief assign no meaning to the term "locality". They apparently abandon even the meaningless definitions heretofore advanced as a cloak to cover a clear usurpation of power, and the effect of their present position is to read the term out of the statute entirely 33

C. The meaning assigned to the term by the court below was plainly correct 37

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A. In common usage the term "locality" is synonymous with such terms as "place", "vicinity", "neighborhood", "district", "community", "city" and "county", and describes an area or place local in nature 39

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4. The fact that the statute contemplates predetermination of wages in advance of bidding upon the contracts affected does not indicate, as petitioners suggest, that a "locality" may be the entire United States, or any portion thereof, as the Secretary of Labor may from time to time determine 60

C. The Determination is contrary to the express provisions of the Act and beyond the authority of the Secretary of Labor 63

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The legislative history of the Act confirms (A) that the authority of the Secretary of Labor under the Act is limited to the ascertainment of prevailing minimum wages in "localities", (B) that the term "locality", as therein employed, means a local center of manufacture, community or similarly described small geographical area, (C) that the Congress deliberately withheld from the Secretary the power either to fix wages in, or to eliminate wage differentials existing between, such localities, and (D) *a fortiori*, that the Congress withheld such powers over the economy of the vast regions in respect of which the Secretary now seeks, in effect, to assert them 65

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A. The Determination seeks to establish a uniform minimum wage in the Thirteen State Area notwithstanding the facts, *inter alia*,

(1) that wage differentials of long standing, based on differing economic conditions, exist between various major regions therein in which iron and steel are manufactured;

(2) that the iron and steel industry is not a sweatshop industry and the minimum wages paid therein in each of such regions are high wages; and

(3) that such differentials have existed for many years without endangering in any way the wage standards in the western regions in which higher wages have been paid 127

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IN THE

Supreme Court of the United States

October Term, 1939

No. 593

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et al., *Petitioners*,

v.

LUKENS STEEL COMPANY, a corporation, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia

BRIEF FOR THE RESPONDENTS

Opinions Below

The judgment of the District Court was entered without an opinion (R. 319-320). The opinions of the United States Court of Appeals for the Dis-

trict of Columbia, the court below (R. 387-410), are reported in 107 Fed. (2d) 627.

Jurisdiction

The jurisdiction of this Court has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Question Presented

The question presented is whether this Court should reverse a judgment (R. 410) of the United States Court of Appeals for the District of Columbia, holding (R. 388, 405) that the complaint (R. 2-45), as amended (R. 313-318), of respondents, seven of the smaller eastern steel companies (R. 9), sets forth facts sufficient to constitute a claim[1] for injunctive relief in respect of (R. 42-44), and a declaratory judgment as to the invalidity of (R. 44), a determination (R. 239-254,—hereinafter called the Determination), by petitioner McLaughlin, as Acting Secretary of Labor,[2] which he purported to make pursuant to the Public Contracts (Walsh-Healey) Act,[3] and in which he purported to "establish" (R. 254) the minimum wages which members of the iron and steel industry desiring to bid on and enter into Government contracts must agree to pay to employees engaged in the performance thereof.

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[1] The District Court had dismissed the complaint, as amended (R. 319-320).

[2] The Determination was made with the authorization, approval, consent and active participation of petitioner Perkins, Secretary of Labor (R. 24).

[3] Act of Congress approved June 30, 1936, Public No. 846-74th Cong.; 49 Stat. 2036-39, c. 881. Appendix (*I*), pp. 1-7.

The court below held (R. 388-405) that the Determination was "not only unwarranted" by the Act "but incongruous" (R. 390) because so far beyond the jurisdiction and authority of the Secretary of Labor thereunder as to be "a palpable evasion of the letter and spirit of the pertinent statute" (R. 396-397) and "an attempt arbitrarily to disregard the statutory mandate" (R. 390).

The basis of such decision was that, whereas the authority of the Secretary of Labor in making wage determinations under the Public Contracts Act is limited to the *ascertainment* of prevailing minimum wages in each "*locality*" (i. e., local center of manufacture or community) in which an industry the subject matter of a determination operates, the Acting Secretary in the Determination had attempted, *inter alia*, to *fix* a single minimum wage for the iron and steel industry in a vast *region* consisting of 13 states, part of a fourteenth, and the District of Columbia, and embracing a number of local centers of manufacture (including those in which respondents' plants are located) with lower prevailing minima, by the simple device of calling that vast region a "locality."

Having so held the court below found it unnecessary to consider the other grounds on which the validity of the Determination was challenged.

The Specific Issues Raised

The specific substantive issue raised is:

Is the Determination invalid because

(a) it was beyond the jurisdiction or authority of the Secretary of Labor under the Public Contracts Act?

(b) it was arbitrary and capricious?

(c) it was not based on the fair and impartial hearing required by the Act?

The specific procedural questions thus raised are:

(a) Do respondents have a standing to sue?

(b) Is the administrative action complained of subject to judicial review?

(c) Is the suit one against the United States?

(d) Do the facts alleged in the complaint entitle respondents to the injunctive relief prayed?

(e) Do the facts alleged in the complaint entitle respondents to a declaratory judgment?

The Statute Involved

The Public Contracts (Walsh-Healey) Act, herein sometimes called the Act, is printed at pp. 1-7 of the Appendix (I) filed herewith. In so far as here material, the Act provides, in substance, as follows:

Section 1 (b) provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, there shall be included a stipulation that all persons employed by the contractor in performing the contract will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed"

(a) "on similar work" "or"

(b) "in the particular or similar"

(i) "industries or"
(ii) "groups of industries"
"currently operating"

"in the *locality* in which the * * * supplies * * * are to be manufactured or furnished under said contract * * * *."

Section 11 provides that Section 1(b) shall apply only to contracts relating to such industries as have been the subject matter of a determination by the Secretary.

Sections 2 and 3 provide for "liquidated damages" in the amount of any underpayment of wages resulting from breach of a minimum wage stipulation (§ 2); contract cancellation for any such breach (*ibid.*); and black-listing from award of Government contracts for three years of any person found by the Secretary to have committed any such breach (§ 3).

Sections 4 and 5 authorize the Secretary to administer the Act, to make rules and regulations necessary to carry out its provisions, and to make necessary appointments (§ 4); confer power upon the Secretary or his authorized or designated representatives to make investigations and findings as provided in the Act (§ 4) and to hold hearings and to issue orders requiring testimony and evidence under oath relating to the matter under investigation or in question (§ 5); require that the Secretary or such a representative "shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" (§ 5); and author-

ize the Secretary or such representative to make such "decisions", based upon findings of fact, as are deemed to be necessary to enforce the provisions of the Act (§ 5).

A copy of the present regulations under the Act (No. 504)[3] is set forth in the Appendix (II, pp. 8-17) filed herewith.

STATEMENT OF FACTS

1. The proceedings leading up to the Determination.

Under date of July 11, 1938, petitioner Walling, the Administrator of the Division of Public Contracts, issued notice (R. 45-46) that a hearing would be held before the Public Contracts Board, appointed by the Secretary of Labor, "to take testimony upon which findings of fact will be made to assist the Secretary * * * in determining * * * the prevailing minimum wages in the Iron and Steel Industry". On July 25 and 26, said Board held a "hearing", at which it received unsworn "evidence" and at which respondents were represented (R. 15-16).

On the basis of such "hearing" the Board made Findings of Facts, Conclusions, and Recommendations, dated October 27, 1938, hereinafter called the Report (R. 17). A copy of the Report (R. 47-218) is annexed as an exhibit to the complaint. It consisted of a majority report (R. 47-207) containing the facts found by all members of the

[3] Such regulations were amended as of April, 1939, but in no respect having any bearing on the questions here presented.

Board (R. 207) and the conclusions and recommendations of two of its three members, and a minority opinion (R. 207-218) by the third member stating his conclusions and recommendations.

In the Report, the Board made findings as to the minimum wages (common labor base rates [4]) paid in 234 of the country's 461 iron and steel plants, and the respective locations of such plants (R. 62-74; 77-113). But proceeding on the assumption that the Public Contracts Act did not limit the jurisdiction of the Secretary of Labor to the determination of prevailing minimum wages in "localities", but on the contrary authorized the Secretary to determine prevailing minimum wages in respect of a particular industry "either as a whole or over broad geographical regions" (R. 160),—an interpretation of the Act theretofore followed by the Department of Labor and its Secretary,[5]—the Board *frankly* made no effort to determine the minimum wages for iron and steel.

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[4] This rate is paid to about 8.6% of the workers in the industry (R. 58). It is "substantially a rock-bottom rate" on which wages paid to all other workers are based (R. 60-61). Consequently, all other hourly wages paid will vary with this basic common labor rate (*ibid.*).

[5] See O. R. Strackbein (Member, Public Contracts Board, U. S. Department of Labor) "The Prevailing Minimum Wage Standard" (1939), pp. 30-31: "The Department of Labor interpreted this language [i.e. Sec. 1 (b) of the Act] as providing four alternatives. The standard, thus interpreted, was held to be the prevailing minimum wages for persons employed (1) on similar work; (2) in the particular industry; (3) in similar industries; or (4) in groups of industries currently operating in the locality.

"Under this interpretation, the restrictive clause 'currently operating in the locality' modifies only the fourth alternative, i.e., groups of industries; and the Secretary of Labor is free to disregard the stricture when any one

workers prevailing in the various localities from which the Government might be supplied with iron and steel. It did, however, frequently recognize that different minimum wages prevailed in numerous "producing centers" and "localities" (see, e.g., R. 176-179, 190-192).

The majority recommended (R. 206-207) that the Secretary determine a prevailing minimum wage of 45c. an hour "within the area made up of" the 12 Southern States, running from Virginia to Texas and Oklahoma, and 62½c. an hour "within the area made up of" the remaining 36 States.[6] The minority differed from the majority in recommending that such 36 states should be divided into four sections and that specified prevailing minimum wages be determined in each (R. 216-218), including "the eastern section" (R. 216),—the "region lying east of what is generally known as the Pittsburgh district" (R. 209),—in which a minimum wage of 56½c. per hour was said to prevail (R. 209-216).

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of the other three alternatives is utilized, i.e., similar work, the particular industry, or similar industries."

To the same effect, see *In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*, 2 Fed. Reg. 233.

[6] The Board found that competition in the industry was virtually nation-wide (R. 183, 189). The principal basis upon which the majority determined a different prevailing minimum wage for the 12 Southern States than for the 36 Northern States was the existence of geographic wage differentials between those two regions (R. 159). Although admitting at the same time the existence of geographic wage differentials in the eastern part of the United States, it ignored them because "on the whole, the variations among them are not large" (R. 189).

2. The Determination.

The matter subsequently came on for oral argument before the Acting Secretary,[7] who handed down the Determination (also annexed to the complaint—R. 239-254) under date of January 16, 1939.

In the argument before the Acting Secretary there was no dispute (and there is none now) regarding the Board's "finding[s] as to the wages actually being paid in the industry" (R. 241), which were accordingly adopted by the Acting Secretary (*ibid.*, R. 314), but only as to the "conclusions" and "recommendation[s] based on these wage facts" (R. 241). All objections thereto were said to turn "upon the construction to be placed upon the language of Section 1 (b) of the Public Contracts Act" (R. 242),—a question of law the decision of which underlay the entire Determination.

Apparently conceiving that it was hopeless further to deny that the authority of the Secretary of Labor under the Act is limited to the determination of prevailing minimum wages in "localities", —as is now conceded by petitioners,—the Acting Secretary in the Determination rendered lip service to the statute by purporting to construe the term "locality", as employed in Section 1(b) (R. 242-246), and then to select geographical "areas" (R. 247-250) comprehended within his unique

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[7] Respondents having theretofore filed a petition to reopen the hearing before the Board (R. 20-21; 218-230), and such petition having been denied (R. 21-22), they filed exceptions to the Report (R. 21-22; 231-239) and a brief in support thereof (R. 22) and participated in such oral argument (R. 22).

definition of "locality" and to determine prevailing minimum wages therein.

The Acting Secretary took the position that the term "locality" means any area, however large, which the Secretary of Labor may select, in the light of "economic facts" pertaining to the particular industry, for the purpose of determining prevailing minimum wages (R. 26, 244-247).[8] In the Determination it was disingenuously implied (R. 245) that this "construction" was the "consistent administrative construction" of the Act; and in the District Court the petitioners stated that the meaning of the word "locality" contained in the Determination "follows the administrative construction consistently adhered to by the Secretary of Labor since the passage of the Public Contracts Act."[9] This myth was exploded by the decision of the court below (R. 393-394). The Solicitor General now properly explains (Pet. p. 17, n. 5; Petitioners' Brief,[10] p. 131) that what the Acting Secretary meant was that the result obtained by such "construction" was "wholly consistent" with

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[8] The definition of "locality" suggested in the petition for certiorari herein (p. 15) was "an area of small or large extent according to the economic facts of the particular industry." Petitioners have apparently abandoned this definition in their brief. The definition, if it may be called such, of the word "locality" now given by them is apparently an area "of any dimensions appropriate under the particular circumstances in the administration of the Act" (Br. p. 116), which area "is *prima facie* as broad as the area within which all of the possible bidders are located" (Br. p. 117). See discussion, pp. 33-37, *infra*.

[9] Page 12 of petitioners' supplemental notes and authorities filed in the United States District Court for the District of Columbia in support of their motion to dismiss respondents' complaint.

[10] Hereinafter cited simply as "Br."

the "results" obtained by the earlier "construction", which had entirely *read out* of the Act the requirement that the Secretary, in determining the minimum wages to be paid by the members of an industry, respectively, must determine such wages prevailing in "localities", and which had led to determinations of such wages for the nation as a whole [11] or over broad geographical regions.[12]

The "consistent result" obtained in this case was as follows:

The Determination divided the entire United States into six areas, designated as "localities" (R. 253-254). It stated that "in the *locality* consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison,[13] and Monongalia, and the District of Columbia," the prevailing minimum wage was deter-

[11] See, e.g., the minimum wage determinations for the Men's Work Clothing Industry, 2 Fed. Reg. 233; the Cotton Garment and Allied Industries, 2 Fed. Reg. 1333; and the Work Glove Industry, 2 Fed. Reg. 1339.

[12] See, e.g., the minimum wage determinations for the Men's Underwear Industry, 2 Fed. Reg. 1337; and the Luggage and Saddlery Industries, Fed. Reg. (Daily) July 15, 1938, p. 1733.

[13] Not the least startling "result" of the Acting Secretary's "flexible" and "reasonably broad interpretation" (Petition for certiorari, pp. 16, 17) of "locality" was that the county of Harrison, West Virginia, although *entirely surrounded* by the southern "locality" designated by him, was nevertheless "determined" to be a part of the "northern locality" in which respondents' plants are situated. (See Appendix VIII.)

mined to be, and was "established" at, 62½c. per hour (R. 254). This area, consisting of 13 states, part of a fourteenth [13] and the District of Columbia, is hereinafter sometimes called the Thirteen State Area. The eastern portion of such area had been frankly characterized in the Report as a "region" (R. 209).

In the other five so-called "localities" selected in the Determination, viz.:

(1) The "southern area", consisting of 12 states [14] and 49 counties of West Virginia (R. 247), which area, prior to the addition of the West Virginia counties, had been viewed by the Board as a "region" covering "a very large territory" (R. 159),

(2) The 3 west "coastal states" [15] (R. 248),

(3) The 8 "mountain states" [16] (R. 248),

(4) The 7 "remaining states east of the mountain states and west of the Mississippi," [17] and the area about East St. Louis, Illinois (R. 248, 253), and,

(5) The 4 states in the "area immediately to the east of the trans-Mississippi locality" [18] (R. 249),

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[14] Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia and Virginia.

[15] Washington, Oregon and California.

[16] Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado and Arizona.

[17] North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa and Missouri.

[18] Wisconsin, Illinois (except the area in and around East St. Louis, Illinois), Michigan and Indiana.

the hourly prevailing minimum wages were determined to be, and were "established" at, 45c., 50c., 60c., 58½c. and 62½c., respectively (R. 253-254). Thus the upshot of the Determination was that four minimum-wage areas were fixed, the 62½c. area running from the Atlantic Ocean to the Mississippi and from Maine to Kentucky.

For the convenience of the Court there are set forth in Appendixes VIII, IX and X, respectively, filed herewith:

(a) A map of the United States showing the six areas designated as "localities" in the Determination, and the minimum wages "established" in each (Appendix VIII);

(b) A copy of a map contained in the February, 1939, issue of the Labor Information Bulletin, published by the Department of Labor, which shows the areas in which the four wage rates established by the Determination were "set" (Appendix IX); and

(c) A map of the United States depicting (i) the approximate location of the plants in the iron and steel industry concerning which wage data are set forth (R. 63-74) in the Report of the Board; (ii) the common labor base rate paid by each such plant; and (iii) a classification of such plants by the number of wage earners employed thereat (Appendix X).

The Determination, as modified by a subsequent order of the Acting Secretary (R. 254) amending

in this respect his previous "decision",[19] was, by its terms, to have become effective on March 1, 1939.

3. The location of respondents' plants; the minimum wages paid thereat; and the collective bargaining agreements pursuant to which they are paid.

Respondents operate iron and steel plants[20] in Coatesville,[21] Ivy Rock, Conshohocken, Swedeland,[22] Chester,[23] and Harrisburg,[24] Pennsylvania; Colgate, Maryland[25]; and Branford, Connecticut[26] (R. 3-8),—all within the Thirteen State Area. The minimum wages (common labor base rates) paid by them vary, depending on the particular respondent and the particular locality in which its plant is situated, from 56½c. per hour to 52½c. per hour

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[19] Compare Section 5 of the Act.

[20] Respondents manufacture and sell a variety of iron and steel products including steel plates (both sheared and universal), flanged and dished heads, steel and wrought iron pipe, hot and cold rolled sheets, hot rolled annealed sheets, galvanized, black and stainless sheets, plain and galvanized wire, gas cylinders, aerial bombs, flanges, coils and couplings (R. 3-8).

[21] Approximately 40 miles from Philadelphia and 310 miles from Pittsburgh.

[22] Ivy Rock, Conshohocken and Swedeland are located approximately 15 miles from Philadelphia and 340 miles from Pittsburgh.

[23] Chester is located approximately 15 miles southwest of Philadelphia and 330 miles from Pittsburgh.

[24] Harrisburg is located approximately 100 miles from Philadelphia and 250 miles from Pittsburgh.

[25] Colgate, Maryland, is located approximately 340 miles from Pittsburgh.

[26] Branford, Connecticut, is located approximately 520 miles from Pittsburgh.

(R. 3-8, 313).[27] In four instances such minimum wages (of 58c. and 56½c. per hour) are paid pursuant to collective bargaining agreements with either the Steel Workers Organizing Committee[28] (R. 4-5, 8) or the Amalgamated Association of Iron, Steel and Tin Workers of North America[29] (R. 6).

4. The purpose and effect of the Determination.

The purpose and effect of the Determination were to *fix* in various localities in which iron and steel products are produced minimum wages *never theretofore prevailing therein.* Such was clearly the case in respect of the localities in which respondents' plants are located, and, space permitting, the same could be shown for many other localities (see e. g. R. 137, 138, 140, 148, 151, 165, 176, 178-180).

It is undisputed that the 62½c. minimum wage established for the Thirteen State Area is not the prevailing minimum wage for iron and steel workers in, or in the vicinity of, any city, county, or

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[27] Respondents Lukens Steel Company, Alan Wood Steel Company, and South Chester Tube Company pay minimum wages of 56½ cents per hour (R. 3, 5, 6); respondents Central Iron & Steel Company and Harrisburg Steel Corporation pay minimum wages of 54 cents per hour (R. 6, 7); respondent The Eastern Rolling Mill Company pays a minmum wage of 53 cents per hour (R. 8); respondent The Atlantic Wire Company pays a minimum wage of 52½ cents per hour (R. 313).

[28] The three agreements with the Steel Workers Organizing Committee provide, in effect, for common labor base rates of 56½ cents (in two instances) and 53 cents per hour.

[29] The agreement with this union provides, in effect, for a common labor base rate of 56½ cents per hour.

other State civil subdivision in which any of respondents' plants is located, or in any small geographical area surrounding any such plant, city, county, or other civil subdivision (R. 314, 255, 63-77; see Appendix X).

In fact, a 62½ cent minimum wage is paid by only one plant and to only 8 employees in the iron and steel industry in all the cities, counties, villages and other State civil subdivisions in which plants of respondents are located (*ibid.*).

The Acting Secretary sought to fix such wage in such localities by the simple device of:

(a) including them in a larger region also embracing Pittsburgh, Youngstown, and other localities to the west enjoying various geographical advantages, in which the prevailing minimum wages for iron and steel workers have for many years been higher than those in the localities in which respondents' plants are situated, and

(b) labelling such large region a "locality" (R. 29-30, 37-38, 314-316).

But the purpose and effect of the Determination were more sweeping. A glance at Appendix X will reveal that by the same process the Acting Secretary sought to fix in one of the great industrial and geographical regions of the nation a minimum wage never theretofore prevailing therein.

Thus, although a minimum wage rate lower than 62½c. per hour is paid by all but three plants (operated by one company and employing 115 common laborers) out of a total of 58 plants (employing 5,389 common laborers) located in what is

known in the industry as the "Eastern District" [30] —being the entire area of the United States east of Altoona, Pennsylvania, and north of Virginia, plus that portion of Maryland west of the Altoona line and certain counties of West Virginia (R. 255; see Appendix X),—the Acting Secretary nevertheless established a 62½c. minimum wage therein. And he did so, notwithstanding the fact that the Bureau of Labor Statistics of his own Department had for many years recognized [31] that such "Eastern District" was an area between which and the so-called "Pittsburgh district" to the west [32] (grouped with it in the Determination) there had long existed a geographic wage differential in the iron and steel industry.[33]

[30] This was a code district for minimum wage *fixing* purposes under the N. I. R. A. Code of Fair Competition for the Iron and Steel Industry (R. 190). The plants of all respondents are situated in communities in such area.

[31] See, among other publications of the Bureau, Bulletin No. 151, May, 1914; Bulletin No. 353, April, 1924; Bulletin No. 567, December, 1932; Serial No. R. 380; Serial No. R. 415; Serial No. R. 430; and Serial No. R. 446.

[32] The most recent description of such districts is contained in Serial No. R. 380 (reprint from Monthly Labor Review for April, 1936), p. 3.

[33] The following compilation of the average hourly earnings (in cents per hour) of common labor in specified departments of the iron and steel industry is taken from United States Bureau of Labor Statistics Bulletins (No. 513, Table 4, No. 567, Table 6, and No. 403, Table 3):

Year	*Eastern*	*Pittsburgh*	*Year*	*Eastern*	*Pittsburgh*
1907	13.4	15.4	1919	39.8	48.0
1908	12.0	15.6	1920	45.1	53.0
1909	12.3	15.2	1922	32.2	36.0
1910	14.2	16.4	1924	38.6	45.1
1911	14.1	16.6	1926	37.4	45.2
1912	14.4	16.7	1929	37.5	45.3
1913	15.7	19.0	1931	35.1	45.9
1914	15.6	19.0	1933	29.1	35.8
1915	15.5	19.0	1935	41.4	46.6
1917	27.8	30.1			

The wage differentials [34] existing at the time of the Determination between the plants in the iron and steel industry located in the western portion (which includes Pittsburgh and Youngstown and is hereinafter sometimes called the Western District) [35] of the Thirteen State Area and those plants which the Determination included in the Thirteen State Area but which are also located in what are known in the Industry as the "Eastern District" [36] (as in the case of respondents' plants), the "Buffalo District" [36] and the "Johnstown District" [36] are shown by the following tabulation of common labor base rates taken from the undisputed wage data set forth in the Report of the Public Contracts Board (R. 63-74; see also R. 255-257):

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[34] As pointed out in the Argument, both the express language of the Act and its legislative history show that the Secretary of Labor was given no power to eliminate geographic wage differentials.

[35] We do not mean to indicate by this classification that there are not also geographic wage differentials existing in what we have spoken of as the "Western District". That there are such differentials is shown conclusively by the record (R. 257, 63-74, 190, 191) and Appendix X. The same thing is true of the Eastern District referred to in the text. We deliberately select these large regions, however, in order to show that, even if large territorial areas be selected as criteria, the Determination is nevertheless invalid.

[36] The term "Eastern District", as employed herein, describes the entire area of the United States east of Altoona, Pa., and north of Virginia, as well as that portion of Maryland west of the Altoona line and that portion of West Virginia lying south of a line drawn west in extension of the southerly boundary of Pennsylvania (R. 29). The term "Buffalo District", as so employed, describes that part of the State of New York lying west of the westerly boundary of the Eastern District and the Counties of Erie, Crawford and Warren, in the State of Pennsylvania. The term

	No. of Plants	No. of Wage Earners	No. of Common Laborers
EASTERN DISTRICT—BASE RATES			
Under 56½c	30	7,660	1,203
Exactly 56½c	18	38,069	3,854
Exactly 57c	5	4,005	194
Over 57c but under 62½c	2	195	23
Exactly 62½c	3	3,602	115
Over 62½c	.....	.....	.....
	58	53,531	5,389
BUFFALO DISTRICT—BASE RATES			
55c and under	4	1,412	171
Over 55c but under 59½c	.....	.....	.....
Exactly 59½c	4	8,611	715
Exactly 60c	1	856	96
Over 60c	.....	.....	.....
	9	10,879	982
JOHNSTOWN DISTRICT—BASE RATES			
Under 58½c	.....	.....	.....
Exactly 58½c	2	8,886	603
Over 58½c	.....	.....	.....
	2	8,886	603

"Johnstown District", as so employed, comprises the County of Cambria and the City of Altoona, Pennsylvania.

Such Districts substantially correspond to the Code districts recognized for minimum wage purposes by the Code of Fair Competition for the Iron and Steel Industry (as amended May 30, 1934).

WESTERN DISTRICT—BASE RATES			
Under 56½c	6	4,909	817
Exactly 56½c	1	53	23
Exactly 57c	.....	.....	.....
Over 57c but under 62½c	3	973	[illegible]
Exactly 62½c	91	149,319	10,5[illegible]
Over 62½c	1	501	43
	102	155,755	11,483

The "consistent result" obtained in the Determination of establishing a uniform wage for the Thirteen State Area was sought to be justified *solely* on the ground that it "would seem" that a single eastern market area was predominantly served by the iron and steel plants in the Thirteen State Area (R. 250, 315),—a justification which would convert the Act into one authorizing the fixing of equal wages for persons employed by manufacturers (wherever located) who market their products in the same area, as distinguished from one authorizing the ascertainment of prevailing minimum wages in localities in which goods are produced (R. 315).

The Acting Secretary's conclusion (denied in the Complaint—R. 315) that a single eastern market area was predominantly served by plants in the Thirteen State Area was apparently based upon, and the only factor referred to in the Determination to justify the selection of such Area as a single "locality" was, a statement in a report allegedly made to an annual meeting of the stockholders of the United States Steel Corporation (R. 31, 246). No such report was introduced in evidence at the hearing before the Public Contracts Board (R. 31).

Thus, even if, as contended by the Secretary of Labor, the Act be construed to confer authority upon her, in cases in which the relevant economic facts make such a determination necessary or appropriate to carry out the purposes of the Act, to establish uniform minimum wages in an area as large as the Thirteen State Area, the only "economic factor", or indeed the only fact, considered in selecting the so-called "locality" consisting of the Thirteen State Area was completely irrelevant to the purposes of the Act and was, moreover, based on matter not properly before the Acting Secretary.

No findings of "economic facts" were made with respect to, nor was consideration given to, proximity to source of supply, freight rate differentials, caliber of labor, living costs, or any of the other factors affecting wage rates, cost of production or ability to continue to market after the Determination, of the various plants in the various communities (or, indeed, regions [37]) in the great Thirteen State Area. On the contrary, the Labor Department sought no evidence on any of these points (R. 214).

The Determination was, therefore, devoid of even a plausible economic justification for the Act-

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[37] The closest approach to such a finding was the statements of the minority of the Board (R. 214-215) that the Board did not have before it any evidence that the wage rates paid by plants in the Eastern District conferred any competitive advantage in bidding on Government contracts; and that "the forcible merging of the eastern with the western section [of the Thirteen State Area] would introduce a reallocation * * * with the effect that an unearned and gratuitous advantage would be given to one area at the expense of the other."

ing Secretary's excursion beyond his lawful authority.

5. The institution of suit.

Prior to the institution of suit respondents requested a further postponement of the effective date of the Determination, but by February 25, 1939 (the date of suit), petitioners Perkins and McLaughlin had not granted the request, and were threatening to make the Determination effective on March 1, 1939 (R. 25). Together with petitioner Walling, they were threatening to require that there be included in every contract within the scope of the Determination [38] which should be entered into after that date (whether or not let pursuant to invitations for bids issued prior to said date [39]), a stipulation requiring payment of the minimum wages prescribed in the Determination (R. 32). Petitioner Perkins had also adopted regulations requiring that every invitation to bid

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[38] That is, every Government contract for products covered by the Determination of a value in excess of $10,000.

[39] This was covered by specific ruling (R. 34). The Complaint alleges (R. 34) that such ruling was not only contrary to the provisions of the Act (Sec. 11) but also contrary to the first paragraph of Article 1101 of the Regulations (No. 504) under the Act, which provides as follows:

> "Art. 1101. (Minimum Wages).—Until a determination of the prevailing minimum wage for a particular industry or group of industries has been made by the Secretary of Labor *prior to the invitation for bids*, the stipulation with respect to wages in section 1(*b*) of the Act will be inoperative, as provided in article 1 (*b*) of these Regulations." [Italics ours.]

on any such contract (and, consequently, every bid thereon) should contain a stipulation binding the bidder to comply with the Determination (Reg. 504, Arts. 1, 1101, Appendix II, pp. 8, 16).

Petitioner Perkins had also adopted a Regulation (No. 504, Art. 1101), providing, in so far as here material, as follows:

> "Determinations of prevailing minimum wages or changes therein will be published in the Federal Register and sent to contracting officers through circular letters of the Procurement Division of the Treasury.",

and had directed and instructed petitioner Peoples, Director of Procurement, to direct every agency of the United States desiring to enter into any such contract after March 1, 1939, to include such a stipulation in such contract and the invitations to bid therefor (R. 32, 33).

Petitioner Peoples, Director of Procurement (R. 10), acting pursuant to the direction of petitioners Perkins, McLaughlin and Walling, had directed and threatened to continue to direct every agency of the United States to include such a stipulation in every such contract and the invitations to bid thereon (R. 32, 34).

The other petitioners, chief contracting officers, and their subordinates, had signified their intent to carry out all such regulations and directions (R. 35). Invitations to bid on Navy contracts already published, and on which respondents desired to bid, contained requirements for such stipulations (R. 33-34, 316).

Accordingly, respondents, who, with one exception,[40] had been selling iron and steel products to

[40] The Atlantic Wire Company.

Government agencies for many years (R. 4-8, 313), filed their complaint (R. 2-45; Exhibits, R. 45-257) on February 25, 1939. Amendments to the complaint, subsequently filed by leave of court (R. 306), are set forth at R. 313-318.

The Complaint sought judgment (R. 42-44) enjoining petitioners from enforcing the Determination as aforesaid, ordering petitioners Perkins, Walling and McLaughlin to set aside and withdraw the Determination, and declaring the Determination to be unauthorized by law and invalid.

6. The gravamen of the Complaint.

The gravamen of the Complaint is that respondents' lawful right to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress is unlawfully invaded and interfered with and threatened with further unlawful invasion and interference by the illegal action taken and threatened by petitioners as aforesaid (R. 36).

As indicative of the long continued and substantial character of the business carried on with the Government by respondents through exercise of that right prior to the Determination and as evidentiary of the likelihood of continued business in the future in the absence of unlawful interference by petitioners,[41] it was alleged, *inter alia*, that the tonnage of the products furnished to Government

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[41] Bulletins No. 126 to 176 of the Division of Public Contracts of the Department of Labor show that more than $1,900,000 aggregate amount of contracts subject to the Public Contracts Act have been awarded for iron and steel products to the respondents since March 27, 1939, the date of the issuance of the preliminary injunction in this case.

agencies by one respondent during the past ten years had average about eight per cent. of its total tonnage and that only during short periods of time during the past twenty years had it been without a Government contract in progress (R. 6-7); that three of the other respondents had had Government contracts during the last two years of a value averaging, in the case of each, well over $125,000 per annum (R. 4, 5, 7); and that two of the respondents were then engaged in the performance of Government contracts of a value over $300,000 (R. 4, 5).

Petitioners' illegal interference with that right was of the most serious nature. Complete destruction of the business relations between respondents and their customer was threatened. The complaint shows that if respondents were required to bid on the basis of compliance with the illegal wage conditions prescribed in the Determination, which would raise respondents' wages between 10% and 19%,[42] they would be in grave danger of being underbid and driven out of competition for Government contracts by large fully integrated companies enjoying more favorable geographic locations[43] (in the West and South) whose wage rates

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[42] In this connection, it is to be borne in mind that, as stated in the Complaint (R. 37), and as recognized in the Report (R. 60-61), an increase in the minimum wages paid by respondents to common laborers employed in the performance of Government contracts would necessitate a corresponding increase for all classes of wage earners employed therein, since rates of pay for such other wage earners are ascertained by adding various differentials to common labor base rates.

[43] From the standpoint of proximity to raw materials, proximity to markets and freight rate differentials (R. 38).

were not increased by the Determination (R. 37-38; 171-173; 162).[44]

The impact of such unlawful interference was immediate. The Complaint specifically describes certain proposed contracts, covered by the Determination, and generally describes others, some to be awarded within two weeks, others within the near future, by Federal agencies (including those headed by the contracting officers who are petitioners herein), and on which respondents desired to bid, and would bid, if the Determination should not become effective, at prices deemed high enough to enable them to realize profits (R. 33-34, 316-317).

The Complaint alleged that between March 1, 1939, and March 9, 1939, bids theretofore invited on contracts for the manufacture of iron and steel products for very substantial amounts were scheduled to be opened by the Navy Department, with a view to awarding contracts thereon; that the invitations for bids on such contracts required that such bids contain stipulations for compliance with the Determination; that respondents Lukens Steel Company (hereinafter called Lukens), Alan Wood Steel Company (hereinafter called Alan Wood) and Central Iron & Steel Company (hereinafter called Central) desired to bid, and, if the Determination should not become effective, would bid, on one of such contracts (Schedule 5681)[45]; that some or all of the respondents desired to, and, if the Determination should not be-

[44] For further proof in the record of such allegation see R. 265, 272, 274, 277, 278, 280.

[45] The affidavits in the record which were filed in support of the allegations in the Complaint show that on March 2, 1939, the bids on such contracts, Schedule No. 5681, covering approximately 7,357 tons of steel plates,

come effective, would, submit bids on some or all of the other contracts referred to; and that all bids submitted would be at prices deemed high enough by the respective bidders to enable them to realize profits on any contracts awarded to them (R. 33-34, 316).

The Complaint further alleged that invitations to bid on numerous large and important contracts for the purchase of iron and steel products by the Navy Department, the War Department, the Treasury Department, the Department of the Interior, the Post Office Department and other agencies of the United States, would be issued, and such contracts awarded, within the immediate future (R. 316-317). It was also alleged that respondents were desirous of bidding on such contracts, and respectively intended, if the Determination should not become effective, to bid on various of such contracts pertaining to products manufactured by them, respectively, at prices deemed high enough to enable them to realize profits on contracts awarded to them (R. 317).[46]

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sheet and strip, were opened. Carnegie-Illinois Steel Company, a subsidiary of United States Steel Corporation (R. 150), submitted the lowest of only three bids, and was awarded the contract. One of such three bids was made subject to the condition that the Determination should not apply to any contract awarded to the bidder (R. 332). Consequently, only two bids received consideration. The estimated value of said contract was $350,000. Central, Alan Wood and Lukens would have bid upon said Schedule No. 5681 had the temporary relief prayed in the Complaint been granted, and the bid which Central had prepared and would have submitted would have been lower than that of the bidder to which the contract was awarded (R. 297-301).

[46] In support of such allegations, the affidavits set forth in the Record show that bids on three of such contracts had been opened by March 15, 1939, and that three of the respondents had been prevented from bidding on such

Respondents had no remedy, other than that which they chose, which was plain, adequate or complete. (R. 36-38). They were advised by their counsel that if they should bid upon, and enter into, any of the contracts referred to above, containing a stipulation for compliance with the Determination, they would be in danger of being estopped to secure a judicial decision as to the invalidity of the Determination (R. 37). Moreover, the penalties provided in the Act (Sections 2 and 3) for non-compliance with any such stipulation (including "liquidated damages", contract cancellation and blacklisting from Government business for 3 years) presented such hazards as to deter them from failing to comply with the unlawful Determination in order to test its validity (R. 37).

7. The decisions of the courts below.

The judgment of the District Court (R. 319-320), rendered without opinion on March 14, 1939, dismissed the Complaint, dissolved a temporary restraining order theretofore issued, and refused to rule on and grant respondents' motion for a preliminary injunction (R. 259-262).

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contracts only because of the refusal of the District Court to grant the temporary relief prayed in the Complaint (R. 298, 299, 303, 306). The impact of the Determination and its enforcement upon respondents is further illustrated by an exchange of telegrams between the Reclamation Bureau of the Department of the Interior and Alan Wood (R. 304-305). From such exchange it is plainly inferable that, by reason of its refusal to comply with the Determination, Alan Wood lost the award on a proposed contract, No. 33119-A Schedule 1, of the Reclamation Bureau, *on which bids were opened February 6, 1939*, notwithstanding the fact that bids on such contracts were invited, submitted and opened almost a month before the Determination became effective.

On March 17, 1939, respondents lodged their record on appeal and, pending printing, filed in the Court of Appeals an original petition for an injunction pending appeal (R. 337-355). After argument on March 22, 1939, before its entire membership (R. 371-372), that court on March 27, 1939, issued its order (R. 372) enjoining the petitioners herein, "until the further order of the Court, from continuing in effect the Determination".

The appeal proper [47] was argued on April 4, 1939, before Justices Miller, Vinson and Edgerton (R. 385-386). On August 4, 1939, in a *per curiam* order and opinion in the appellate proceeding (R. 387-388); the court continued in effect the injunction previously granted,[48] announced the decision of its majority that the complaint stated a cause of action for an injunction as prayed, and stated that, upon filing of majority and minority opinions, the appropriate judgment would be entered.

On October 3, 1939, the opinions (R. 388-410) were filed, and judgment (R. 410) was entered reversing the judgment of the District Court and remanding the case with instructions to proceed in accordance with the opinion of the Court of Appeals.

Petitioners urge that various errors were committed in entering said judgment (Br., p. 11). No error in the issuance of the above-mentioned injunction is assigned, however.

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[47] Together with petitioners' motion to reargue the granting of the preliminary injunction or to clarify the injunction granted (R. 373-378).

[48] Such injunction is still in effect, and the order continuing it, of course, disposed of petitioners' motion referred to in the preceding note. *Cf.* Br., p. 11.

ARGUMENT

PART ONE—THE INVALIDITY OF THE WAGE DETERMINATION

I

The primary question presented is a pure question of law, viz., the proper construction of the term "locality", as employed in Section 1(b) of the Walsh-Healey Act, which term delimits the jurisdiction or authority of the Secretary of Labor under the Act and to which petitioners either assign no meaning or, at most, a meaningless definition designed to permit the Secretary to determine her own jurisdiction, to cloak a usurpation of the power to fix wages and to obtain the same results as those obtained under a construction of the Act, now abandoned and concededly improper, which openly read the term out of the statute.

A. The authority of the Secretary under the Act is limited to the factual determination of minimum wages which prevail in "localities", and is conferred only to the end that each person seeking or contracting to supply goods to the Government may be required to agree to pay a minimum wage prevailing in the locality in which he is to manufacture or furnish such goods under his contract.

As pointed out in the Statement, Section 1 (b) of the Act requires that each Government supply contractor must agree, in any contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, that he will pay his employees engaged in the performance of the contract

"not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the *locality* in which he * * * supplies * * * are to be manufactured or furnished under said contract * * *." [Italics ours.]

As also pointed out, such requirement applies only to "contracts relating to such industries as have been the subject matter of a [wage] determination by the Secretary of Labor" (§11). It is undisputed that the intent of this latter provision is that only contracts let pursuant to invitations for bids issued after the effective date of any such determination shall be affected thereby (Regs. 504, Art. 1101).

The statute thus plainly contemplates that the Secretary of Labor, in due course and in such sequence as may be deemed proper, shall make determinations [1], in accordance with the statute, of the minimum wages to be paid, respectively, by those members of the respective industries who shall manufacture for, or furnish to, the Government the several classes of supplies purchased by it; each determination to cover contracts thereafter to be bid upon and let to any members of the industry or industries which manufacture or furnish a specified class or classes of supplies. The command of the statute as to the minimum wages to be so determined is equally clear.

[1] And, from time to time, such redeterminations as may be necessary to keep the original determinations reasonably current. The Secretary has not made any redeterminations to this date.

The only minimum wages which any person obtaining a contract must agree to pay pursuant thereto are those which prevail, for persons employed as stated in Section 1 (b), in the locality in which he is to manufacture or furnish the particular supplies. Consequently, the wage determination covering all contracts thereafter to be bid upon and let for the manufacture or furnishing of supplies of that class, must determine the minimum wages prevailing for persons so employed in each of the localities in which supplies of that class are manufactured or furnished, viz.: the minimum wages prevailing for persons employed in the locality either

(1) on similar work; or
(2) in the particular industry (i. e., the industry manufacturing or furnishing the class or classes of supplies in question); or
(3) in similar industries; or
(4) in the particular group of industries (i. e., in the group of industries manufacturing or furnishing the class or classes of supplies in question); or
(5) in a similar group of industries.

The Secretary is thus authorized to use any one of a number of statistical bases for each such locality in making her factual determination of the minimum wages which the several variously situated prospective contractors for a given class of supplies must respectively agree to pay; but in each case the minimum wages so determined and applicable to any contractor, and so required to be paid by him, must be minimum wages which in fact prevail in the locality in which he is to

manufacture or furnish such supplies under his contract.

The Secretary has no jurisdiction, for instance, to determine minimum wages prevailing on the continent of North America; nor is authority conferred to determine such wages prevailing in the United States, or in any "regions" or other "broad geographical areas" thereof. She must determine such wages only in "localities", to the end that each person seeking or contracting to supply goods to the Government shall agree to pay a minimum wage prevailing in the locality in which he is to manufacture or furnish such goods under his contract. The Secretary's jurisdiction or authority is, therefore, bounded by the meaning of the word "locality", as employed in the statute.

The proper construction of that term,—a question of law to be determined by this Court,[2]—thus stands at the threshold of any consideration of the validity of the Determination.

B. Petitioners in their brief assign no meaning to the term "locality". They apparently abandon even the meaningless definitions heretofore advanced as a cloak to cover a clear usurpation of power, and the effect of their present position is to read the term out of the statute entirely.

[2] Petitioners seem to suggest that the Secretary has a power or discretion to determine her jurisdiction (i. e., to determine the proper construction of the term "locality") which binds the courts to accept her conception thereof, unless arbitrary or capricious. (See Br., pp. 134-139.) This suggestion is altogether without merit. (See pp. 228-238, *infra*.) But even if it were correct, it would be of no avail to petitioners herein, since, as hereinafter shown, and as held by the court below, the acting Secretary's construction of the Act was palpably wrong.

For reasons which are obvious enough, petitioners have displayed a reluctance to set forth in their brief any clear cut statement of the meaning (or lack of meaning) which they assign to the word "locality". Notwithstanding their protests that the statute has received a consistent administrative construction (Br., pp. 128-132),[4] their rather emphatic criticisms of the construction of the court below,[5] and their repeated arguments as to what "locality" does *not* mean, their brief nowhere attempts to define this pivotal term. The closest approaches to any such definition are the statements appearing at pages 116 and 117 of their brief that

> "the language should be construed so as to authorize the designation of 'localities' of any dimensions appropriate under particular circumstances in the administration of the Act"; and
> "the 'locality in which the materials * * * are to be manufactured * * *' is *prima facie* as broad as the area within which all of the possible bidders [on a contract] are located."

In the Determination, the Acting Secretary took the position that a "locality" was any area, however large, which the Secretary might select in the light of economic facts pertaining to a particular industry, for the purpose of determining prevailing minimum wages therein.[6] The court

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[4] See p. 10, *supra*.

[5] See e.g. Br., pp. 104, 131.

[6] The Acting Secretary stated that the Act must be construed to "permit the Secretary to exercise a sound discretion in the selection of appropriate units for prevailing minimum wage determinations" (R. 244) after "considering the economic facts of the [particular] industry itself" (R. 246).

below was advised that "the word 'locality' used in Section 1 (b) means an area to be determined by the Secretary as a matter of discretion and upon consideration of *various* factors in the the particular industry for which the determination is made" [7]. In the petition for certiorari, petitioners stated (p. 15) that "the word means an area of small or large extent according to the economic facts of the particular industry". All such "definitions" are meaningless and are mere cloaks to cover the usurpation of a power to fix wages (either in the entire United States or over broad geographical regions),—a power which Congress definitely refused to grant to the Secretary (see pp. 97-101, *infra*).

Petitioners' present reluctance to define the term is quite understandable, because, in fact, they do not assign any meaning to it, although naturally they do not desire to say so.

Without expressly saying so, they read the word "locality" out of the statute even more effectually than the Secretary did in her earlier determinations under a "construction" of the statute now conceded to be improper, but under which she obtained results that petitioners now claim are "consistent" with those sought in the Determination before the Court. (See pp. 10-11, *supra;* pp. 113-117, *infra*). In those determinations as in this the Secretary claimed the power in her discretion to establish for any industry a uniform minimum wage throughout the United States, or any portion thereof (see Br., pp. 121, 150); and it is on this basis alone that she seeks to justify the Determination.

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[7] See Brief of Appellees below, p. 14.

Consequently, although petitioners carefully avoid definition of the term which delimits the Secretary's authority under the statute, there is no mystery about their real position. To them "locality", as therein employed, is so indefinite as to be meaningless; it comprehends anything from a hamlet to the entire United States; and the Secretary is to give it such application in making wage determinations as, in the exercise of her discretion, she may from time to time deem proper.

Nor is there any mystery concerning the following:

(1) Such view, if accepted, will give to the Secretary the power, for the purposes of the statute, to fix for hundreds of communities, and, indeed, for great regions and sections of the country, minimum wages never theretofore prevailing in *any* industry therein; such wages to be fixed in her uncontrolled discretion, except that she may not establish for any such industry a minimum wage higher than that which she finds to be most usual, in the United States or in any selected portion thereof including such communities, regions or sections, for those employed *either* (a) on similar work, or (b) in the particular industry, or (c) in similar industries, or (d) in the particular group of industries, or (e) in a similar group of industries.

(2) Such view, if adopted, will give to the Secretary the power to fix for an industry located in one section of the country, a wage not paid by any one therein, merely because that wage is paid in another industry located in an entirely different section.

(3) Such view, if sustained, will virtually con-

stitute the Secretary of Labor an industrial dictator with power to drive out of competition for the Government contracts affected all except the favored group which can conform to her notions as to proper minimum wages.

(4) The fundamental premise underlying such view is that it was the Congressional purpose (in enacting a statute requiring contractors to agree to pay minimum wages prevailing in the localities in which they are to do their work) to require all who may compete for the same Government contract to pay the same minimum wage. As we shall hereinafter show, nothing could be farther from the purpose of Congress in enacting the statute.

The statutory basis for this enormous grant of power is sought to be found solely in the asserted indefiniteness of a word, the common meaning of which is generally understood by every school boy and was clearly recognized by the Public Contracts Board in the Report. (See pp. 7-8, *supra.*)

C. The meaning assigned to the term by the court below is clearly correct.

The court below found no such indefiniteness in the term "locality". While recognizing that the term does not precisely mark out the boundaries of a particular territorial unit for purposes of exact measurement in terms of acres or square miles (R. 390), it also pointed out that the term is definite, within limits generally understood and "long and well known to those acquainted with the American tradition" (R. 390, 393).

It held, that as employed in the statute, the word plainly denotes a "*local center* of manufacture", "community", or similarly described small geo-

graphical area (R. 392, 395, 390). It so held on the ground that such was the meaning accorded to the term by popular acceptance and usage (R. 390-393) and compelled by the context and obvious purpose of the statute (R. 392, 394). The court further pointed out that such meaning was confirmed by the legislative history of the Act, including statements of those sponsoring and in charge of the legislation to the effect that the purpose of its wage provisions was to authorize the Secretary to ascertain prevailing minimum wages in "communities", but not to fix wages (R. 395).

We submit that the decision of the court below is clearly correct, whether considered from the standpoint of the commonly-accepted usage of the term "locality", the context in which it is employed in the Act, or the legislative history and purpose of the Act.

II

The Determination was palpably beyond the authority of the Secretary of Labor, since the term "locality", as employed in the Act, plainly means a "local center of manufacture", "community", or similarly described small geographical area surrounding the place of performance of a Government contract.

A. In common usage the term "locality" is synonymous with such terms as "place", "vicinity", "neighborhood", "district", "community", "city" and "county", and describes an area or place local in nature.

There is probably no rule of statutory construction more firmly established by the decisions of this Court[1] than that the Congress, in enacting a statute, presumptively uses the language employed therein in its usual significance and in accordance with common understanding. Accordingly, the first inquiry of the court below was as to the commonly accepted meaning of the term "locality". Its conclusion was that that term, frequently used by many Americans, is not commonly employed to describe either the entire United States or a large geographical area, with widely diverse interests, such as the Thirteen State Area, but, on the contrary, is commonly used synonymously with such terms as "place", "vicinity", "neighborhood", and "community" and to describe a small geographical area (R. 390-393).

Such conclusion is assailed by petitioners as

[1] *Federal Housing Administration* v. *Burr*,.....U. S....., 60 Sup. Ct. 488, 491.; *City of Lincoln, Neb.*, v. *Ricketts*, 297 U. S. 373, 376.

unreasonable (Br., p. 99-100), although the attack is delivered under guise of argument that the word "locality" has no such "intrinsic" meaning,—whatever that may mean,—as to exclude the geographic units established by the Determination (*ibid*, pp. 93 et seq.). The very fact that petitioners are impelled to make such an argument is indicative of the weakness of their case.

Petitioners refer to dictionary definitions (Br., p. 100); accordingly, for the convenience of the Court, we set forth in Appendix VII a collection of such definitions. But neither the members of this Court, nor any other American, need consult a dictionary to know that the term "locality", in common usage, means what the court below said it meant, and does not mean the entire United States or an area such as the Thirteen State Area.

"Locality" and its derivatives are among the most common words in American speech and tradition. The opinion of the court below (R. 390-391) collects many of the more familiar expressions embodying them and many judicial decisions with respect thereto. To avoid unnecessary repetition thereof, we respectfully refer this Court to such passages in the opinion of the court below.

Because of the frequency of its employment in our daily life, further illustrations, almost without number, which show the commonly accepted usage of the term "locality", might be cumulated. We confine ourselves to a few, each of which we believe to be highly pertinent.

1. Correct usage of the term "locality", and the palpable misuse thereof by the Acting Secretary in the Determination, are vividly illustrated by the Report of the Public Contracts Board in this very matter.

As pointed out in the Statement (p. 7, *supra*) the Public Contracts Board in its Report proceeded on the erroneous theory that the function of the Secretary of Labor under the Act was not limited to the ascertainment of prevailing minimum wages in "localities". Consequently, it made no effort to ascertain prevailing minimum wages in "localities" and freely employed the term "locality" and the term "region" in accordance with ordinarily accepted usage. In so doing, however, it brought into bold relief the patent subterfuge resorted to in the Determination.

Thus, the Board said (R. 159):

> "In view of the evidence which shows that across the South for a distance of some 2,000 miles from East to West the minimum wages in the industry are uniformly low, * * * we believe that this *region* should be taken separately for the purpose of finding a prevailing minimum wage.
>
> "The Southern *region* as we have defined its limits here covers a very large territory. * * * *" (Italics ours.)

That the "region" thus found by the Board as an appropriate geographical area within which to determine prevailing minimum wages did not constitute a "locality" and could not properly be called a "locality" was plainly recognized by the Board in many passages of the Report, including the following (R. 160):

> "The principal difficulty with the Code wage districts as a means of outlining *regional* boundaries which might be set up in these proceedings is that the Code districts were not drawn up to bring out the predominant minimum wage practice of the industry viewed either as a whole or over broad geographical regions. The opposite objective motivated the drawing of the boundaries of the Code wage districts * * *. As it is expressed in the brief of the Andrews Steel Company, under the Code 'basic wage rates were established in the steel industry considering *local* conditions as found in the separate plant locations' * * *." (Italics ours.)

By the mere stroke of the pen, this vast "Southern region" was transformed in the Determination into a mere "locality", *after the addition thereto of most of the State of West Virginia.*

The Board also said (R. 176):

> "While it is apparent that no portion of the wage scale can be assigned exclusively to New England, or east of Pittsburgh, or the Middle West or the West, it is a fact that in a good many *localities* and areas over the breadth of the country one or another of the base rates is paid to more workers than is any of the other rates. * * *" (Italics ours.)

The Board refused to give effect to these wage differentials between the various localities because it did not believe that "relatively small geographical areas should be made the basis for separate findings of prevailing minimum wages which would be limited to the *locale* of the variation"

(R. 180) and stated that the Secretary of Labor had the power to find prevailing minimum wages for both an industry as a whole or in "broad geographical regions" (R. 160). The Board would have been shocked, however, had any one suggested that such "regions" constituted "localities".

As stated by O. R. Strackbein, a member of the Board, in his book entitled "The Prevailing Minimum Wage Standard"[2] at pp. 70-71:

> "The word 'locality' in its general acceptation denotes a limited geographical area. * * *
>
> * * * * * *
>
> "We may conclude that whatever interpretation might be placed on the term 'locality', it could not be expanded to an extent sufficient to incorporate a State, *without usurping a meaning* which could be expressed better by a less controversial term and *without passing beyond its own accepted sense.* Locality is indissolubly associated in its meaning with 'neighborhood' and 'vicinity', and both of these latter terms, although indeterminate in their geographical implications, denote proximity to any given central point." (Italics ours.)

That the Acting Secretary "usurped a meaning," as well as power, in making his Determination, seems incontrovertible.

2. The commonly accepted usage of the term "locality" is further illustrated by the construction it has received when employed in all other Federal prevailing wage statutes, and the definitions thereof which have been given in the various State prevailing wage statutes.

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[2] Graphic Arts Press, Washington, D. C. (1939).

In so far as we have been able to ascertain, the Congress has enacted, all told, seven statutes, including the Walsh-Healey Act, requiring payment to the persons described therein of the prevailing or prevailing minimum wages in designated territorial units:

The first such statute, the Bacon-Davis Act (46 Stat. 1494; 49 Stat. 1011) is set forth in Appendix III, and is hereinafter discussed at some length (see pp. 68-70, *infra*). For present purposes it is sufficient to note that it provides, in substance, for payment by Federal construction contractors of wages prevailing in the city, town, village or other civil subdivision of the State in which their work is to be performed. These territorial units have been described by the Secretary of Labor in her regulations as "localities" (see p. 69, *infra*).

The second such statute was the Emergency Relief Appropriation Act of 1936 (49 Stat. 1608), which appropriated funds for relief projects and provided that the persons engaged thereon should be paid "not less than the prevailing rates of pay for work of a similar nature." That statute was administratively construed to provide for payment of such rates prevailing in "localities", i. e. counties or their immediate vicinities.[3]

The next such statute was the Walsh-Healey Act.

Since the enactment of the latter statute Congress has enacted the Emergency Relief Appropriation Acts of 1937 (50 Stat. 352, 354, § 2) and

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[3] Administrative Order No. 44, dated July 11, 1936, of Works Progress Administration (1 Fed. Reg. 1520).

1938 (52 Stat. 809, 812, § 9), providing that the rates of pay for persons employed on relief projects should be not less than the prevailing rates of pay for work of a similar nature "in the same locality"; and the Acts of September 1, 1937 (50 Stat. 888, 897), creating the United States Housing Authority, and of June 3, 1939 (53 Stat. 807), amending the National Housing Act, each of which provides for the payment of wages "prevailing in the locality" in which the work is to be performed. Pertinent extracts from the four statutes last cited are set forth in Appendix VI.

It is conceded by petitioners (Br., pp. 94-95, note 79) that the term "locality", as employed in the four statutes last cited, "denotes a small geographical area." This is sought to be explained on the ground that such statutes deal with construction work, the site of which is known in advance of bidding on a contract therefor (*ibid.*). The fact is, however, that both of the Emergency Relief Appropriation Acts deal with work of all sorts, including "educational, professional, clerical, cultural, recreational, production, service, * * * and miscellaneous non-construction projects".

We venture to suggest, therefore, that the term "locality", as employed in such statutes, denotes a small geographical area for a reason far less abstruse than that suggested by petitioners. It denotes such an area because such is its denotation in ordinary speech. And its inclusion in a prevailing wage statute emphasizes that it is being used in its commonly accepted sense. (See pp. 50-55, *infra*.)

The foregoing conclusions are confirmed by the

employment and definition of "locality" in various state prevailing wage statutes. Typically, the term is defined as "the town, city, village or other civil subdivision of the state wherein the physical work is being performed" (Laws N. Y., 1927, ch. 563, p. 1340, §1); or "the county wherein the physical work is being performed" (R. S. Kans. 1923, § 44-201; L. 1931, ch. 214, §1); or "the county or municipality in which the work is being done" (Rev. Stat. N. J. 1937, § 34:10-1).[4] Most of such statutes deal only with public construction contracts, but where they also apply to supply contracts,[5] the localities within the state remain constant in size and do not expand into large regions as petitioners seem to think they should under such circumstances.

3. The decision of this Court in *Connally* v. *General Construction Co.*, 269 U. S. 385, supports respondents' contention that the term "locality", as employed in Section 1 (b) of the Act, means a small geographical area.

The *Connally* case, *supra*, involved a suit brought by a contractor to enjoin certain State and county officers of Oklahoma from enforcing an Oklahoma statute making it a crime for any State contractor to pay "less than the current rate of per diem wages in the locality where the work is performed". The defendants had threatened to

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[4] See also Laws Arizona, 1933, ch. 71, § 5; Ohio Code (Throckmorton) § 17-3; Tex. Ann. Stats. (Vernon) Art. 515 9A, § 4; Utah R. S. (Supp. 1939), § 76 B-O-1; West Virginia Code of 1937, Art. 5A § 2357 (1).

[5] Rev. Stat. N. J. 1937, §34:10-1. R. S. Kans. 1923 (1933 Supp.), §44-201; Laws Oregon, 1937, ch. 200, §1

prosecute the plaintiff for failure to pay wages "paid to laborers in the vicinity of Cleveland", Oklahoma, near which town the plaintiff was constructing a bridge. This Court affirmed an interlocutory decree granting a preliminary injunction.

A majority of the Court (per Mr. Justice Sutherland) so held on the ground that the statute did not satisfy the constitutional requirement of the "due process" clause that a statute *imposing criminal penalties* must be specific in its terms, stating that both the phrases "the current rate of per diem wages" and "in the locality" were not sufficiently definite for such purpose.

It is significant, however, that the majority of the Court so held while accepting the correctness, as of course, of the definition of the term "locality" by the highest court of the State, viz., *"place", "near the place", "vicinity", or "neighborhood"*. In so far as the decision of the majority concerned the word "locality", its reasoning was that even the term "neighborhood" would not have been sufficiently specific for a statute imposing criminal penalties.

The elasticity of both terms, so enthusiastically noted by petitioners herein (Br., p. 97), was said to be one which might "be equally satisfied *by areas measured by rods or miles*" (p. 395). Even this slight elasticity was held to be too great for a penal statute, since "two men, moving in any direction from the place of operations, would not be at all likely to agree upon the *point* where they had passed the boundary which separated the locality of that work from the next locality" (p. 394). But, said the majority (at p. 395): "In other connections or under other conditions the term 'locality' might be definite enough * * *."

The concurring opinion of Mr. Justice Holmes and Mr. Justice Brandeis is likewise of great significance. They concurred in the decision on the narrow ground that "the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland" (at p. 396). Their view must, therefore, have been that the term "locality", as employed in the statute, plainly denoted a town and its vicinity, and either (a) that this was a warning to those subject to the statute sufficiently definite to permit the imposition of criminal sanctions; or (b) that such constitutional question was one too close to be decided if the case could be disposed of on the assumption that the statute was thus sufficiently definite.

Whatever the disparity of views of the members of the Court on the narrow issue presented in the *Connally* case, the entire Court seems to have been in agreement on the basic proposition of interest herein, namely, that a "locality" is a small geographical area.

B. The context in which the term "locality" is employed in the Act confirms that it is used in its ordinarily accepted sense to describe the place, or a narrowly restricted area surrounding the place, where supplies are to be manufactured or furnished under a contract, i. e., a local center of manufacture or community.

Petitioners argue strenuously (Br., p. 104) that in order to ascertain the meaning of the term "locality", as employed in the Act, the context in which it is used must be considered. It is signifi-

cant, however, that they devote little, if any, attention to the context. On the contrary, after making the above statement, they immediately pass to an argument as to the alleged purposes and objects of the legislation, which is predicated not on the language of the statute itself, but upon alleged extrinsic aids, including reports by various Massachusetts commissions rendered years after the passage of the Act. (Br., pp. 110-112).

At a later point we will consider in some detail the legislative history of the Act and show that it confirms what we believe plainly appears on the face of the statute (see pp. 65-112, *infra*). At this time, however, we accept petitioners' challenge to consider the context in which the term "locality" is employed in the statute.

Upon such consideration, the conclusion is irresistible that such term,—which even petitioners concede "is *often* used to denote a small geographical unit" (Br., p. 94),— is unquestionably so employed in the statute and thus means what the court below said it meant, after considering the context (R. 392, 394). Upon such consideration, it likewise appears that the purposes of the wage provisions of the Act were, by requiring the contractors affected to pay the minimum wages prevailing in their respective communities, (a) to avoid placing the Government in the position of inducing wage cutting or otherwise disturbing local wage standards, (b) to avoid placing the Government in the position of dealing with those paying sweatshop wages not conforming to the standards of their communities, and (c) to encourage employers conforming to such community wage standards.

1. The fact that the term "locality" is used in the statute to designate the unit of determination of a "prevailing" wage confirms that it is employed in its commonly accepted sense.

The authority conferred by the Act upon the Secretary of Labor is that of determining "*prevailing* minimum wages" in "localities". The fact that the Secretary is thus limited to the factual ascertainment of *prevailing* wages affords, in and of itself, overwhelming confirmation that the Congress, in designating the "locality" as the unit for wage determination, employed that term in its commonly accepted sense.

Analysis of the experience of this country in the field of wage regulation shows that the wage statutes which have been enacted may be generally classified into three groups:

(a) Statutes, such as the Fair Labor Standards Act of 1938,[6] in which the legislature itself fixes a minimum wage.

(b) Statutes providing for wage fixing by the executive in the light of the standards provided therein. Such statutes authorize the imposition of a wage, in the exercise of a reasonably limited administrative discretion, after investigation and consideration of various factors bearing on the reasonableness or fairness of the particular wage, such as the nature and value of the services rendered, the health of the wage earners involved, the ability of employers to pay the wage, etc.

(c) Prevailing wage statutes. Such statutes require payment, not of a wage fixed and imposed by the executive after investigation and considera-

[6] 52 Stat. 1060.

tion of its fairness and reasonableness, but of a wage which is already existing and is assumed to be fair and reasonable because it has been accepted by, and represents the judgment (rendered in the light of the particular circumstances) of, the majority in the community in which it is paid. To the extent that executive action is resorted to for the purpose of implementing such statutes, the power conferred is that of ascertaining an existing fact, viz: the prevailing wage in question.

Two considerations with respect to such prevailing wage statutes are of vital significance here. In the first place, the unit for wage determination thereunder is invariably a small geographical area; in the second place, the statutes are customarily, if not invariably, limited in their application to public work, or work financed directly or indirectly with public funds.[7]

Use of a large geographical area as a unit for determination of a prevailing wage would run counter to the entire philosophy underlying the prevailing wage statutes. As indicated above, the underlying concept of requiring payment of a prevailing wage is that the wage rates which prevail in a given local area are in general those which experience has demonstrated are fair and reasonable considering the conditions which obtain in that area and which are accepted as such by most employees and employers in that area. It is elementary, however, that local conditions now have, and always have had, a controlling effect on the

[7] We have not found any prevailing wage statute which is not so limited in its application.

wages which can be paid, and which in fairness should be paid, in any given place.[8] Costs of living, efficiency of labor, costs of production, and a host of other conditions, vary widely as between different communities. Consequently, as soon as one departs from the local community as the wage unit one also parts company with the basic concept of the prevailing wage standard.

It is not coincidence, therefore, that every other Federal statute which has employed the prevailing wage standard concededly contemplated wage determinations in small territorial units (see pp. 44-45, *supra*). In this connection, it is most significant that the only such statute which did not so *expressly* provide was, nevertheless, administratively so construed, in accordance with what was undoubtedly the Congressional intent.[9] It is also

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[8] An interesting illustration of this fact is to be found in Executive Order No. 7076 dated May 20, 1935, under the Emergency Relief Appropriation Act of 1935, in which the President in prescribing schedules of monthly earnings of workers on projects covered thereby prescribed different amounts which varied by counties according to the population of the largest municipality therein and the region in which they were located and made certain exceptions in the event "that local circumstances warrant a different rate of earnings." It is also interesting to note that, although the Emergency Relief Appropriation Act of 1935 did not provide for payment of prevailing wages, the hourly wages (as distinguished from the monthly earnings) paid thereunder were fixed on the basis of the prevailing wages in the locality of payment. (See O. R. Strackbein, The Prevailing Minimum Wage Standard (1939), p. 16-17.)

[9] See p. 44, *supra*. The statute in question, the Emergency Relief Appropriation Act of 1936, was plainly intended to authorize the continuance of the practice under the Emergency Relief Appropriation Act of 1935, discussed in Note 8, *supra*. This is borne out by the fact that the Emergency Relief Appropriation Acts of 1937 and

of the greatest significance that neither our research nor that of petitioners has produced a single State prevailing wage statute providing a unit for wage determination consisting of more than a territorial fraction of the State. With unfailing consistency, such statutes designate as units for wage determination either political subdivisions, their vicinities, or "localities", generally defined as indicated above.[10]

In substance, therefore, if one is to be guided by either the legislative experience in this country or the basic concept underlying the prevailing wage standard, one necessarily thinks of prevailing wage determinations in terms of small territorial units. It was in such terms that Congress thought in enacting the Walsh-Healey Act.

Mention has already been made of the fact that

1938 in terms provided for payment of not less than the prevailing rates of pay for work of a similar nature "in the same locality."

[10] *Rev. Code Ariz. Anno.* (1936 Supp.) §2755b; *Labor Code Calif.* (1937) §§1771, 1724; *Colo. Stats. Anno.* (1935) Ch. 97, §257; *Conn. Gen. Stats.* (1939 Supp.) §793e; *Rev. Code Del.* (1935) §3643; *Comp. L. Fla.* (Perm. Supp. 1936) §1365(5); *Idaho Laws*, 1939 Ch. 33; *Illinois Laws*, 1939, p. 563; *Baldwin's Ind. Stats.* (1935 Supp.) §10039-1; *Gen. Stats. Kans. Anno.* (1935) §44-201; *Carroll's Ky. Stats.* (1936 Rev.) §4329; *Code Pub. Loc. Laws Md.* (1930) Art. 4, §516; *Anno L. Mass* (1938 Supp.) Ch. 149, §26; *Rev. Codes Mont.* (1935) §3043.1; *Nevada Laws*, 1939, Ch. 139; *Rev. Stats. N. J.* (1937) §34:10-1; *New Mex. Stats. Anno.* (1938 Supp.) §114A-301; *New York Laws*, 1939, Ch. 832; *Throckmorton's Anno. Ohio Code*, (1936) §§17-3, 17-4; *Harlow's Okla. Stats.* (1931) §10872; *Oregon Laws*, 1937, Ch. 200; *R. I. Gen. Laws* (1938) Ch. 290, §5; *Vernon's Tex. Stats.* (1936) Art. 5159a; *Utah Rev. Stats.* (1939 Supp.) §76B-0-1; *W. Va. Code* (1937) §2357(1); *Wisc. Stats.* (1937) §103.49.

such statutes are customary only in the field of public work. The reason for this is evident. The purposes of such statutes are threefold: first, to avoid placing the Government, Federal, State or local, in the position of dealing with those paying wages below the prevailing standards; second, to avoid placing the Government in the position of inducing wage-cutting or otherwise disturbing local wage standards; and third, to encourage and protect the employer who conforms to the community wage standard, which is presumptively fair and reasonable. Such statutes satisfy all such purposes and, in so doing, avoid the controversial problems and administrative complications incident to executive wage-fixing.

To interpret the Act as suggested by petitioners, i. e., to permit the Secretary to consider either the entire United States, or any broad geographical region thereof, as a locality, would be to fly in the face of the considerations mentioned above. Such interpretation would, moreover, transform the Secretary's function from the fact-finding function, consistently delegated to the administrative arm by prevailing wage statutes, to one of wage-fixing—and wage-fixing without adequate standards to guide her. As stated by the Acting Secretary in the Determination (R. 246), when so construed "the language of the statute does not itself suggest answers to the questions which it raises."

That such interpretation would confer such wage-fixing power is apparent upon the most superficial consideration, as we have already pointed out (*supra*, p. 36). Thus, the Secretary could *impose* in her discretion not only upon indi-

viduals, but upon entire communities, regions and sections, wages believed by *her* to be proper but not in fact *prevailing* in any locality therein, through the simple device of selecting and gerrymandering portions of the country, as she has done in this case.

It is simply preposterous to suggest that the Congress intended such results in enacting a prevailing wage statute, which, following the general practice, designated the "locality" as the unit for wage determination, for the reasons above stated.

2. The fact that the Secretary is authorized by the Act to determine the minimum wages prevailing in each locality for persons employed on "similar work or in the particular or similar industries or groups of industries", likewise confirms that the term "locality" is used in the statute to mean a small geographical area.

We have heretofore noted that the Secretary is authorized to use any one of the several statistical bases permitted by the standard quoted in the heading in making her factual determination of minimum wages for each locality. This makes good sense if a "locality", for purposes of the statute, is a community, in which all employers engaged in similar work face substantially the same economic conditions. It is incredible, however, that the Congress would have so provided had its conception of a "locality" been the entire United States, or any broad region or section thereof in which employers operate under varying circumstances and conditions.

Thus, if, as is plainly the case, a "locality", for purposes of the statute, is a community, the above

mentioned authorization dovetails completely with what we described as the basic concept of the prevailing wage standard, viz. that it is the experience and judgment of the community which gives to a prevailing wage the circumstantial guarantee of fairness. The broader the base utilized in ascertaining the prevailing wages paid to the lowest-paid class of labor by employers engaged in similar work in a given community, the more likely is it that the prevailing wage found will reflect the community's experience and judgment. Conversely, the likelihood of award of a public contract to an employer who operates the only plant of a particular industry in the community, and who pays a sweatshop wage not conforming to the standard of the community for similar work, is correspondingly decreased.

Petitioners' construction of the Act, under which the entire United States, or great sections or regions thereof, are to be considered as "localities", as the Secretary of Labor may choose, would lead to ridiculous results. Thus, both the copper smelter in Montana, operating under one set of conditions and paying one wage, and the copper smelter in Arizona, operating under another set of conditions and paying another wage, could be required to pay a wage differing from that paid by either and from that paid by anyone engaged in similar work in their respective sections of the country, viz. the wage paid by the blast furnace operator in Pittsburgh, or in Birmingham, operating under entirely different conditions. That this example is not an exaggeration is shown by the fact that petitioners claim this very power on behalf of the Secretary in their brief (p. 118).

They state that "these alternative bases were included to enable the Secretary of Labor to meet the situation in which an entire industry * * * is affected with [what the Secretary considers to be] sweatshop wage conditions."

It cannot be supposed that the Congress intended to sanction any such absurd results.

3. To attribute to the term "locality", as employed in the statute, any meaning other than its ordinarily accepted meaning, would raise grave doubts as to the constitutionality of the legislation and run counter to the Congressional purpose, clearly evidenced in the statute as a whole, to withhold from the Secretary any broad, indefinite regulatory power over wages or otherwise.

It is, of course, well settled that an interpretation of a statute giving rise to serious doubts as to its constitutionality should be avoided, if possible.[11] Grave doubts as to the validity of the wage provisions of the Act would arise if the construction contended for by petitioners should be given to the word "locality".[12] The delegation of legislative authority under the statute, so construed, would be so great[13] that, as is conceded in the Determination itself, the language of the statute would not even suggest answers to the questions

[11] *Ann Arbor Railroad Co.* v. *U. S.*, 281 U. S. 658, 669; *United States* v. *Jim Fuey Moy*, 241 U. S. 394, 401.

[12] We have not challenged the constitutionality of the Act. The only point made here is that the unconstitutional interpretation resulting from petitioners' construction should be avoided.

[13] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *A. L. A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495.

which would have to be answered in its administration.

Thus, even if the statute were unclear and susceptible of two equally possible interpretations, it would be presumed that the Congress did not intend so to delegate legislative authority to the Secretary. But here there is no necessity to resort to any such presumption. Unless the key word "locality" is deprived of its ordinary and well recognized meaning,—a meaning which, as we have shown, is confirmed and compelled by its immediate context,—the statute is perfectly clear and does not raise questions to which the answer is not suggested.[14] Moreover, the entire statute is, on its face, a concrete expression of a Congressional intent to withhold from the Secretary any broad, indefinite regulatory power over the subjects dealt with therein and to prevent any such questions from arising.

Mere examination of the measure as a whole shows that its regulatory provisions in Section 1 were designed to operate as automatically, definitely, and, indeed, mathematically, as possible.[15]

[14] Any statute could be deprived of its clarity by such a process.

[15] In prohibiting child labor, the Act (§ 1 (d)) definitely specifies the minimum age for employment and requires no antecedent administrative determination of the hazardous or nonhazardous character of the employment. (*Cf.* § 3 (l) of the Fair Labor Standards Act of 1938, 52 Stat. 1060). In outlawing bid brokerage and homework (§ 1(a)) the requirement that the contractor be "a manufacturer of or a regular dealer" in the supplies to be purchased was borrowed from a statute long in effect (R. S. § 3722, 34 U. S. C., § 572) and of well settled meaning. In interdicting other sweatshop working conditions (§ 1 (e)), compliance with State law was made *prima facie* compliance with the statute. In regulating hours, the number of hours of permissible employment per day and per week was specified in terms (§ 1 (c)).

None of such provisions, except that regulating wages, requires administrative implementation; and, in the case of that lone exception, the power conferred on the Secretary of Labor is a fact-finding power.

The sphere for administrative action is thus almost wholly confined, in terms, to the granting of exemptions (§§ 6, 3), inspection and investigation (§ 4), determination of violations (§ 3), and the issuance of regulations conforming to, and necessary to carry out the specific provisions of, the legislation. The *only* substantial discretion vested in the Secretary,—the *only* grant of power to determine questions of policy within the framework of a broad standard,—is that pertaining to exemptions (§§ 6, 3).

Plainly, therefore, the statute reflects a deliberate intent that the Congress itself should specify, with particularity and without administrative aid involving policy formulation or the exercise of broad discretion, the maximum extent to which those subject to the legislation should be regulated and the character of such regulation; and that only in determining whether less than such maximum regulation should be imposed in an appropriate case, should the administrative arm be authorized to perform a policy-making or broadly discretionary function.

Such intent, clearly evidenced by the statute itself, is utterly inconsistent with the interpretation which the Secretary now seeks to place thereon,—an interpretation under which she seeks to arrogate to herself a roving commission to fix wages in her virtually uncontrolled discretion.

4. The fact that the statute contemplates predetermination of wages in advance of bidding upon the contracts affected does not indicate, as petitioners suggest, that a "locality" may be the entire United United States, or any portion thereof, as the Secretary of Labor may from time to time determine.

Petitioners seek to support their construction of the Act by repeated statements which imply or assume that the Secretary of Labor is authorized and required under the Act to determine, in advance of the bidding on any contract within the scope of the Act, the locality in which the supplies called for by such contract are to be manufactured or furnished.[16] (See, e. g., Br., pp. 117, 119, 145.) From that unwarranted premise they reach the conclusion that the Secretary of Labor's determination of minimum wages to be paid in any industry manufacturing or furnishing supplies must establish a uniform wage for any geographical area in which are located plants of members of that industry who in the judgment of the Secretary will be *likely* to bid on the same contract or contracts (*ibid.*).[17]

Both the premise and the conclusion entirely ignore the express provisions of the Act.

Section 1 (b) of the Act requires that the contractor shall agree *in his contract* that those employed by him in the performance of the contract "will be paid * * * not less than the minimum wages as determined by the Secretary of Labor

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[16] No such contention had ever been advanced before during this litigation.

[17] That area they consider to be the locality in which supplies *are* to be manufactured under such contracts.

to be the prevailing minimum wages * * * in the locality in which the * * * supplies * * * are to be manufactured or furnished under said contract".

Section 11 of the Act provides that the provisions of the Act requiring such an agreement on the part of the contractor "shall apply only to * * * contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor".

In other words, the "subject matter" of the wage determination by the Secretary is not the contract or the locality in which the contract is to be performed, but the industry or industries to which the contract relates, viz: the industry or industries members of which manufacture or furnish supplies of the kind which are called for by the contract.

It follows of necessity from the express terms of Section 1 (b) that in the wage determination which the Secretary of Labor shall make for any industry she must determine the minimum wages prevailing in each locality in which the members of that industry manufacture or furnish supplies that are likely to be purchased by the Government. It is equally clear, however, that, in making a wage determination for any industry, the Secretary of Labor is not authorized or required to determine where any Government contract for supplies to be manufactured or furnished by any member of that industry is to be performed.

The procedure established by the Act is that the Secretary shall, in due course and in such sequence as may be deemed proper, determine minimum wages to be paid in the various industries which

shall manufacture or furnish supplies under Government contracts. Until the Secretary shall have determined such minimum wages for any industry, the members of that industry who shall bid for Government contracts are not required to agree to pay any minimum wages. After the Secretary shall have made a wage determination for that industry, each of the members thereof who shall bid for any such contract is required to agree to pay the minimum wages found by the Secretary in such determination to be the prevailing minimum wages in the locality in which the supplies called for by the contract are to be manufactured or furnished by him.

The procedural machinery thus established by the Act accomplishes the double purpose of enabling the bidder to know in advance what minimum wages he will be required to pay if awarded the contract and of giving the Secretary of Labor time to make the required determinations after due investigation and deliberation. That procedure in no way alters or affects, and was plainly not intended to alter or affect, the substantive requirements of Section 1(b) of the Act with regard to the minimum wages which a contractor is required to agree to pay, except that under such procedure a contractor is not required to make any agreement in that regard, if a wage determination relating to his industry is not at the time in effect. With that exception the substantive requirements of Section 1(b) of the Act would be the same, if the Act provided that the prevailing minimum wages in any locality should be determined by the Secretary of Labor only when and as a dispute should arise under the particular con-

tract. Petitioners' attempt to change the substantive requirements of the Act by constantly emphasizing that the procedural machinery established thereby provides for predetermination of minimum wages is palpably unsound.

The procedure established by Congress is thus entirely clear and simple. Congress foresaw and provided against the very dilemma with which petitioners now claim the Secretary of Labor is confronted under the Act, and which they assert requires that she fix uniform minimum wages for geographical areas which will include all localities in which she may think a Government contract to be advertised at some future time is likely to be performed.

The Congress neither authorized the Secretary to indulge, nor imposed on her the duty of indulging, in any such speculation.

It thus becomes apparent not only that petitioners' contentions in this regard ignore the express provisions of the statute, but also that they are advanced for the first time at this late date for the purpose of affording a colorable justification to support petitioners' theory that Congress intended by the wage provisions of the Act to require that all bidders for a Government contract within the scope of the Act should agree to pay the same minimum wages. That theory flies in the face of the express words of the Act and entirely reads out of it the term "locality".

C. The Determination is contrary to the express provisions of the Act and beyond the authority of the Secretary of Labor.

It is submitted that an examination of the

statute itself shows that the term "locality", as employed therein, denotes a "local center of manufacture", "community", or similarly described small geographical area surrounding the place of performance of a Government contract. The Secretary of Labor is, therefore, without authority under the Act to determine prevailing minimum wages in geographical units larger than those comprehended within the limits of such definition. Conversely, in administering the Act, she may determine such wages in any territorial units fairly comprehended by such definition.[18] It is conceded by petitioners,—as it must be,—that the Thirteen State Area and the other broad geographical regions used as territorial bases for wage determination in the Determination do not fall within such limits.

Accordingly, the Determination is patently unlawful and beyond the statutory authority of the Secretary of Labor. There is, therefore, no need to consult the legislative history of the Act; and the court below was correct in so holding (R. 394). But, if recourse is had to the legislative history, the conclusions that our construction of the term "locality" is correct, and that the Determination was completely beyond the Secretary's authority, are emphatically confirmed, as will be shown.

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[18] For instance, as pointed out by the court below, the Secretary might, in the light of the circumstances, determine such wages either in a city, a county or some similar subdivision of a State, or in a metropolitan area or the immediate vicinity of any such civil subdivision, whether or not overlapping political boundaries (R. 392), since all such geographical areas are fairly embraced within the concept of "locality".

III

The legislative history of the Act confirms (A) that the authority of the Secretary of Labor under the act is limited to the ascertainment of prevailing minimum wages in "localities", (B) that the term "locality", as therein employed, means a local center of manufacture, community or similarly described small geographical area, (C) that the Congress deliberately withheld from the Secretary the power either to fix wages in, or to eliminate wage differentials existing between, such localities, and (D) *a fortiori*, that the Congress withheld such powers over the economy of the vast regions in respect of which the Secretary now seeks, in effect, to assert them.

A. The background in the light of which the Walsh-Healey legislation was introduced.

1. R.S., Section 3709.

The Walsh-Healey Act and the determination of the Acting Secretary of Labor challenged herein and which he purported to make under the authority thereof must be considered against the background of Section 3709 of the Revised Statutes (41 U.S.C. § 5), the basic statute regulating the award of public contracts.

Section 3709, known as the "lowest responsible bidder" statute and sometimes so referred to herein, provides that:

> "Except as otherwise provided by law all purchases and contracts for supplies or services, in any of the departments of the Government,

and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals." [41 U. S. C § 5]

As uniformly interpreted, such statute requires competitive bidding, after advertisement, on Government contracts (not specifically excepted by law), and the award of such contracts to the lowest responsible bidders.[1]

Consequently, it has long been settled that, unless specifically empowered so to do by another statute, executive officers may not impose upon bidders for such contracts conditions or qualifications requiring conformity to the social, economic or political policies advocated by such officers, but not necessary to protect the United States in connection with the performance of the contracts, since the imposition of such conditions or qualifications would manifestly tend to narrow competition for Government business and raise the prices required to be paid by the Government for articles or services purchased.

Thus, in 1890, the Attorney General held (19 Op. Atty. Gen. 685) that, in the absence of express

[1] *Schneider* v. *United States*, 19 Ct. Cl. 547; *Scott* v. *United States*, 44 Ct. Cl. 524; 19 Op. Atty. Gen. 685; 28 Op. Atty. Gen. 384; 38 Op. Atty. Gen. 555, 557.

statutory authority, an executive department might not impose as a condition upon bidding on a contract an agreement to conform to a schedule of maximum hours for workers employed in the performance of the contract. Similarly, in the absence of such authority, an executive department may not lawfully include in invitations for bids and contracts for Government work stipulations requiring contractors to pay any specified wage rates to employees engaged in the performance of such contracts (10 Comp. Gen. Dec. 294).[2]

The decision of the Comptroller General last cited was rendered on January 10, 1931, in response to a request made by the Secretary of the Treasury at the instance of the President for a ruling as to whether there could be included in invitations for bids on a government construction project a provision requiring the contractor to pay

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[2] This decision of the Comptroller General has been followed in practice by all the executive departments of the Government, and was expressly confirmed by the Senate Committee in charge of the Walsh bill (S. 3055, 74th Cong., 1st Sess.) hereinafter discussed. In explaining the desirability of a statute authorizing the insertion of a minimum wage stipulation in contracts for Government supplies, the Senate Committee Report (No. 1157, 74th Cong., 1st Sess.) on such bill stated:

> "The committee believes that in the absence of action by Congress the Executive has power to require any condition in contracts, loans, or grants necessary to protect the United States but that his authority stops there and that matters of general policy not strictly necessary to secure to the United States the performance of a contract can only be laid down by Congress."

To the same effect as the decision of the Comptroller General cited in the text, see 19 Comp. Gen. Dec. 673 (1940).

employees on such work the "local wage scale" or the "prevailing rate of wages in the locality or metropolitan area in which the project is being constructed."

Since such decision of the Comptroller General, there has been a series of statutory provisions, of which Section 1(b) of the Public Contracts Act is one, designed to carry out a general policy that the wages paid by contractors performing Government work, or work financed by the Government, should conform to the currently prevailing wage rates or minimum wage rates for like work in the locality where the work is to be performed.[3]

2. The Bacon-Davis Act.

The Bacon-Davis Act (46 Stat. 1494), introduced in Congress on January 27, 1931, 17 days after the above-mentioned decision of the Comptroller General, and presumably in consequence thereof, was the first of such statutory provisions. A copy of such act, as amended on August 30, 1935, (49 Stat. 1011), is set forth in Appendix III. As so amended, it requires, in substance, (a) that the advertised specifications for every Government construction contract in excess of $2,000 shall state the minimum wages to be paid each class of workmen employed by prime or sub-contractors at the construction site, which wages shall be "based upon" the prevailing wages, to be determined by the Secretary of Labor, for projects of similar character "in the city, town, village, or other civil sub-division of the state in which the work is to be performed"; and (b) that every such contract

[3] See the statutes cited at pp. 44-45, *supra*.

shall contain a stipulation requiring payment of such wages to such workmen.

The territorial units within which such prevailing wages are authorized to be determined under the Bacon-Davis Act as aforesaid, were described by Representative Bacon of New York, co-author of the statute, in the House debates preceding its adoption, as "communities",[4] and are described by the Secretary of Labor in her regulations for predetermining such prevailing rates as "localities".[5]

The basic principle of the Bacon-Davis Act is that the contractor shall pay to his employees not less than the wage which prevails at the place, i. e.,—in the community or locaiity,—where the Government work is to be done. This serves to preserve the local wage standard and to avoid placing the Government in the position of inducing wage cutting. It also generally assures that a wage which is fair, in view of all the circumstances, will be paid on Government work.[5a]

That wage will, of course, differ from community to community, as local conditions vary, but, in each instance, there remains what may be called the circumstantial guarantee of its fairness. That guarantee is that most of the employees and most of the employers in the particular community accept that wage as a proper one in view of the peculiar circumstances and conditions obtaining in the community.

All other provisions of the Bacon-Davis Act constitute mere machinery for the effectuation of

[4] 74 Cong. Rec. 6511.

[5] Regulations No. 503, U. S. Dept. Labor (Sept. 30, 1935), § 2.

[5a] H. R. Report No. 2453, 71st Cong., 3rd Sess., p. 2.

the central principle outlined above. Thus, when originally enacted in 1931, the statute did not provide for predetermination of the prevailing wage prior to award of the contract, but merely provided for arbitration of any dispute pertaining thereto by the Secretary of Labor. In the 1935 amendment to the statute, the Congress provided for predetermination of prevailing wages by the Secretary in order that the contractor might know in advance the minimum wage he would be required to pay. This, of course, in no way changed the fundamental principle of the statute. Whether or not the wage was predetermined, the guiding principle was that the contractor must undertake to pay his employees the prevailing wage in the community in which the contract work was to be performed.

It will be noted that the Bacon-Davis Act applies only to construction contracts.[6] Wages to be paid in the performance of supply contracts were not regulated until 1933.

3. The N. I. R. A. and its invalidation.

Through executive action taken pursuant to the National Industrial Recovery Act (48 Stat. 195), the scope of regulation of the wages to be paid, and other labor conditions to be observed, by Government contractors was greatly expanded. By executive orders (Executive Order No. 6246, dated August 10, 1933, as supplemented by Executive Order No. 6646, dated March 14, 1934), the President required, in substance, that all Government

[6] The hours of labor for employees on construction contracts are regulated by the "eight-hour" law, Act of June 19, 1912, c. 174, 37 Stat. 137.

contractors (including supply contractors and subcontractors), as well as beneficiaries, direct or indirect, of Government loans and grants, agree to conform to the provisions of the applicable codes of fair competition approved under the National Industrial Recovery Act or, in the absence of an applicable approved code, with the provisions of the President's Re-employment Agreement. Such emergency codes contained provisions, given legal effect through executive action, which prescribed maximum hours, minimum wages and other labor conditions in industry,—in some instances on a national, in other instances on a regional or sectional basis.

When Title I of the N. I. R. A. was declared unconstitutional by this Court on May 27, 1935, in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, the operation of the various codes and of the above-mentioned executive orders was, of course, suspended.[7] Thereafter, in conformity with the established rule hereinabove referred to, the Comptroller General held that, except as authorized by the Bacon-Davis Act (or other statutes dealing with labor conditions), the executive departments could not lawfully require wage or other labor stipulations in connection with the bidding upon or award of Government contracts.[8]

It is a matter of common knowledge that immediately after the decision in the *Schechter* case the Administration issued an appeal to industry generally voluntarily to maintain the wages, hours and working conditions that had been established under the various codes and which had already

[7] Administrative Order GC-90, dated June 3, 1935, of the National Industrial Recovery Board.

[8] 14 Comp. Gen. Dec. 905; 15 Comp. Gen. Dec. 2.

been departed from to an undetermined extent. It also sought additional legislation [9] applicable to Government contracts, loans and grants which would, in substance, have required conformity to code or like conditions in the performance of such contracts and the expenditure of such loans and grants.

In so far as Government contracts were concerned, it was contended [10] that such legislation was necessary (a) in order to avoid placing the Government in the position of urging upon industry voluntary maintenance of code labor conditions while encouraging departure therefrom by awarding contracts to lowest responsible bidders, regardless of labor conditions; and (b) in order to encourage and protect the fair employer.

It is also a matter of common knowledge, however, that prior to the *Schechter* decision there was widespread dissatisfaction in many quarters with the code system and the codes; and that this dissatisfaction was shared by many who heartily favored wholesome and enlightened labor conditions, who wished to encourage the fair employer, and who desired to speed national recovery.

We shall hereinafter note certain of the objections, as expressed during the legislative proceedings leading up to the Walsh-Healey Act, to the attempted achievement of such ends by the code method,—involving executive wage fixing, hour limitation and other labor regulation under authority broadly delegated,—or by any similar method to be applied to Government contracts. We

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[9] That is, the Walsh bill (S. 3055, 74th Cong. 1st Sess.) hereinafter discussed.

[10] See H. R. Hearing on S. 3055, 74th Cong. 1st Sess., pp. 12, 13.

are not now concerned, and will not then be concerned, with debating the validity of such objections or the social, economic or political wisdom thereof. The important points are that such views existed and were strongly entertained both within the Congress and without; and that their existence and forceful presentation eventually resulted in changing almost beyond recognition both the terms and certain of the objectives of the legislation dealing with Governments contracts, as originally introduced at the behest of the Administration.

B. The successive steps in the legislative history of the Walsh-Healey Act.

1. The Walsh bill and its failure of enactment.

On June 14, 1935, Senator Walsh of Massachusetts, at the request of the Administration,[11] introduced in the Senate a bill (S. 3055—74th Cong., 1st Sess.) providing (§1), in substance, *inter alia*, for the inclusion in all proposals (bids) or contracts for Government work of agreements that all persons in classes of employment described in the invitations to bid, when engaged in work necessary to the performance of the contract by a contractor or sub-contractor, should be paid not less than the minimum wages and employed not to exceed the maximum hours designated specifically or by reference in such invitations to bid. Like agreements were to be required in connection with loans or grants (§ 2).

The bill, as it was passed by the Senate on Au-

[11] 79 Cong. Rec. 12728.

gust 12, 1935,[12] provided (§§ 8 and 10) that the minimum wages and maximum hours so specified or referred to should be determined by the President or such agency as he might designate, provided that the wages and hours so fixed should be "fair and reasonable taking into account the following primary standards":

> "(a) The cost of living;
> "(b) The standards for the same class of labor in the same locality;
> "(c) The standards in effect for such class of labor during the year 1934; and
> "(d) The minimum rates of pay and maximum hours of labor specified in the applicable codes of fair competition * * * or where there were * * * no approved codes * * *, in the President's Reemployment Agreement * * *".

The bill so passed also provided for stipulations against the use of child labor (as therein defined) and convict labor.[13]

The Walsh bill was thus on its face, among other things, a wage-fixing measure. Within a week after its passage by the Senate, the House Judiciary Committee held hearings upon it.[14] At such hearings the measure met with a storm of objections, among which were the objections that it was an attempt to revive the N. I. R. A. and the codes, with their alleged evils and weaknesses;[15] that it conferred a virtually unfettered

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[12] A copy of such bill as passed by the Senate is set forth in Appendix IV.

[13] See § 1, Appendix IV, p. 22.

[14] H. R. Hearing on S. 3055, 74th Cong. 1st Sess., Serial 12.

[15] *Id.*, pp. 38-10.

discretion to fix wages and unlawfully delegated legislative authority;[16] that, in exercising the power so granted, the wage-fixing agency might disregard existing wage differentials between rural or other small communities and large cities and, in so disregarding the prevailing local standards, drive out of competition for Government contracts, and destroy, rural and small-town industry;[17] that the wage-fixing agency might likewise disregard existing differentials between the various regions and sections of the country;[18] and that the inevitable effect of such legislation would be to foster monopoly.[19] After holding such hearings the House Judiciary Committee decided not to report the bill.

2. The Healey bill.

On March 2, 1936, at the next session of the 74th Congress, Representative Healey of Massachusetts, a member of the House Judiciary Committee, introduced a new bill (H. R. 11554—74th Cong., 2nd Sess.), drawn by a sub-committee, of which he was chairman, with the assistance of the Department of Labor.[20] That bill, a copy of which is set forth in Appendix V, eliminated certain of the features criticized in the Walsh bill, including, *inter alia*, specific reference to the codes, coverage of loans and grants, and certain of the penalties on contractors for violation of stipulations by subcontractors.

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[16] *Id.*, pp. 38, 50.
[17] *Id.*, pp. 58, 63, 87, 88, 91, 94, 95, 397.
[18] *Id.*, pp. 35, 53-56, 397.
[19] *Id.*, pp. 35, 55, 58, 89, 95.
[20] H. R. Hearings on H. R. 11554, 74th Cong., 2nd Sess. Serial 12, Part 2, pp. 124, 228.

It provided (§ 1), among other things, that all bids upon or contracts for Government work in an amount exceeding $2,000 should contain a representation or agreement that all persons employed upon the work in classes of employment described in the invitation to bid should be paid not less than such minimum rates of pay and employed not to exceed such maximum hours as should be designated specifically or by reference in the invitation to bid. It further provided (§ 9) that such minimum wages and maximum hours should be determined by the Secretary of Labor; that the minimum wages so fixed should be "fairly and reasonably commensurate with the value of the service or class of service rendered" and that:

> "* * * In establishing a minimum wage for any service or class of service under this Act the Secretary without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, (2) may be guided by like considerations as would guide a court in a suit for the reasonable value for services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid for work of like or comparable character by employers who voluntarily maintain minimum fair-wage standards; * * *."

The bill also provided (§ 1) for stipulations against the employment of child labor (as therein defined) and convict labor, and that all the foregoing stipulations should be applicable to sub-contractors (§ 2).

H. R. 11554 was thus also clearly intended to authorize the fixing of wages, either nationally or in large sections or regions of the country, as the Secretary of Labor might decide.

3. The hearings on the Healey bill.

A sub-committee of the House Committee on the Judiciary promptly held extensive hearings,[21] which were attended by a number of members of the Committee as well. What transpired at such hearings is of great importance for the reason that, as stated by Representative Healey on the floor of the House when the legislation was eventually reported, "many changes" were made to meet the objections voiced thereat.[22] For the convenience of the Court, copies of the report of such hearings will be handed up at the time of the argument.

(a) The focus of the controversy before the Committee—wage and hour regulation.

There was very little serious controversy about the convict and child labor provisions of the bill. Nor, as the hearing proceeded and pertinent testimony was adduced,[23] was there any real disposition to quarrel with the propriety of legislation designed to attack the problems of bid-brokerage and home work (not covered in the bill, as introduced), which together with child labor, were

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[21] H. R. Hearings on H. R. 11554, Serial 12, Part 2. The report of such hearings is hereinafter cited as "Hearings".

[22] 80 Cong. Rec. 10001.

[23] Hearings, pp. 164, 203-209.

stated to be primary factors in producing sweatshops.[24]

The pivotal issue was the enormous power that the bill would confer upon the Secretary of Labor to fix wages and hours.[25] In this connection it is appropriate to note at the outset that both supporters[26] and opponents[27] of the measure were agreed that, although limited in terms to performance of Government contracts, the wage and hour regulation contemplated thereby would not be so limited in practical effect, but would, on the contrary, extend to virtually all work carried on by those performing Government contracts, due to the impracticability of separately carrying on, and maintaining different working conditions with respect to, the two types of work in the same plant. It was also agreed that Government contracts were of great importance to industry.[28]

(b) The arguments of those advocating the wage and hour regulation contemplated by the measure.

Supporters of the bill argued that such wage and hour regulation was necessary because the Government's policy of letting contracts to the lowest responsible bidders, without regard to their labor conditions, was causing employers to cut wages and lengthen hours in order to obtain or perform such contracts.[29] Certain statistics were adduced showing wage-cutting and hour lengthen-

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[24] *Id.*, pp. 203-209.
[25] *Id.*, pp. 388, 447.
[26] *Id.*, p. 390 (William Green).
[27] *Id.*, pp. 237, 275, 308, 309, 311, 317, 327, 440.
[28] *Id.*, pp. 157, 160.
[29] *Id.*, pp. 153, 208, 212, 222, 268.

ing by firms receiving Government contracts.[30] There was danger, it was stated,[31] that this process would force the majority of employers, who were fair, to emulate their wage-cutting and hour-lengthening competitors. It was urged that the pending legislation should be passed in order to protect and encourage fair employers already observing the conditions that would be enforced under the Act.[32] It was maintained[33] that, unless this action were taken, the Government would be in the position of urging such employers voluntarily to continue such conditions, while itself aiding their non-conforming competitors.

There was also some testimony as to the disparity between wage conditions in the various states and with regard to industrial migration from high-wage areas to lower-wage areas;[34] but these considerations were not generally advanced as reasons for enactment of the pending bill. Indeed, Senator Walsh indignantly denied[35] that the legislation had been introduced either to protect or favor industry in his home state (said to be a high-wage state), as petitioners seem to imply (Br., pp. 108-112).

The alarm of the opponents of the measure at the authority over wages that it would confer on the Secretary of Labor was considered unjustified by the supporters of the measure,[36] including the

[30] *Id.*, pp. 131-153.
[31] See Note 29, *supra*. See also Hearings, pp. 364, 366.
[32] Hearings, pp. 162, 169, 211, 228, 231, 269, 361.
[33] *Id.*, pp. 153, 189, 211, 222.
[34] *Id.*, pp. 282.
[35] *Id.*, pp. 412.
[36] *Id.*, pp. 178, 361, 189.

Secretary,[37] for the asserted reason that in making her determinations she would fix the minimum wages prevailing, even though not required to do so by the terms of the bill.

(c) The objections advanced against such wage and hour regulation.

Each of the contracting officers representing executive departments and 34 of the 35 representatives of industry who appeared or filed statements at the hearing opposed the bill. Their testimony on certain of the more important phases of the proposed wage and hour regulation may be summarized as follows:

(1) *No General Wage and Hour Regulation.* Practically every opposition witness, including representatives of the Navy[38] and War[39] Departments, and witnesses who concededly represented "fair" employers,[40] opposed all provisions of the bill, except the relatively non-controversial portions referred to above. It was pointed out that the statistics adduced and the testimony of the witnesses favoring the legislation showed that wage-cutting and increased hours were confined to a relatively few industries, such as the garment and like industries, peculiarly subject to sweatshop conditions.[41] It was specifically noted that in the major and heavy industries,[42] and particularly the

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[37] *Id.*, pp. 222.
[38] *Id.*, pp. 179-188.
[39] *Id.*, pp. 165-170, 171-175.
[40] *Id.*, pp. 394, 449.
[41] *Id.*, pp. 169, 179, 277, 398, 545. This was admitted by various witnesses supporting the bill. See, e. g., p. 269.
[42] See note 41, *supra.*

steel industry,[43] none of the tendencies decried by the proponents of the legislation was discernible. It was, therefore, urged that if any such legislation were enacted, it should not be applicable to industry generally, but should be confined in its application (either directly, or in the discretion of the Department letting the contract) to those industries in which wage-cutting and lengthened hours existed in appreciable degree.[44]

(2) *Excessive and Indefinite Delegation of Authority.* Numerous witnesses urged that the bill would unlawfully delegate legislative authority to the Secretary of Labor, for the reason that the standards provided were so vague and indefinite as virtually to confer a blanket, life and death, power to fix wages and hours in industry.[45] Many others urged that, regardless of the constitutional validity of any such grant of power, it was socially, economically and politically most unwise to confer upon any executive officer or officers,—particularly the Secretary of Labor,[46]—any such enormous and indefinite power over the national economic life.[47] Although opposed to any rigid specification of hours of employment, on the ground that necessary flexibility in production would be destroyed, they stated that they would rather have Congress set definite limits than invest the Secretary with a practically unlimited discretion to change the rules

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[43] *Id.*, pp. 290, 296.

[44] See, e. g., the testimony of Col. Corbin, office of the Quartermaster General, Hearings, p. 171. See also p. 461.

[45] *Id.*, pp. 246, 307, 311, 392, 439, 451, 543, 549.

[46] *Id.*, pp. 298, 406.

[47] *Id.*, pp. 257, 266, 298, 299, 321, 322, 359, 394, 543, 545, 549.

of production at any time.[48] Their fears that the gravest social and economic consequences, including dislocation of the industrial structure, retardation of economic recovery and increased unemployment, might result from exercise of the wage-fixing power by a single individual or a small group, were not soothed by the proffered assurances that the Secretary of Labor would fix prevailing minimum wages.[49] On the contrary, a much more live and realistic issue, aggravated by those very assurances, was: "Minimum wages which prevail,—where?"

(3) *Wage Differentials Between Localities.* Indeed, among the most vehement and insistent objections made to the bill were those that the Secretary would be empowered thereby to disregard or change the wage differentials existing between communities, particularly between rural communities or small towns and large cities, and to fix uniform wages in such localities.[50] In this connection statistics were submitted to prove that the cost of living in the smaller communities was sub-

[48] *Id.*, pp. 348.

[49] The impression which petitioners seek to create (Br., pp. 125-126, particularly note 16) to the effect that the principal controversy before the Committee was as to whether the Secretary of Labor should have the authority to fix any wage she pleased, or whether her authority should be that of establishing wages most prevalent in industry over broad areas, is incorrect, and does not reflect the facts. On the contrary, as shown herein, the Secretary of Labor had indicated that she would be pleased to be authorized to establish "prevailing" wages over broad areas; and this, in and of itself, gave rise to numerous objections. It is interesting to note that petitioners cite no authority for their statement.

[50] Hearings, pp. 237, 239, 245, 249, 250-251, 291, 302-304, 309, 313, 393, 402-412, 422-436, 440.

stantially lower than in the larger communities;[51] that the labor in many such small communities was not as efficient as the more highly-skilled labor in the larger and longer-established industrial communities;[52] and that such smaller localities were generally at a competitive disadvantage, when compared to such larger and better-established industrial centers, in the matter of cost of transportation, access to raw materials, proximity to markets and other elements affecting the cost of production.[53] Consequently, it was argued that the lower rates of wages prevailing in such smaller localities not only resulted in payment of real wages equivalent to, or higher than, those in the larger cities,[54] but that the disturbance of the existing local wage differentials would result in the destruction of such local industries, unemployment of the workers therein, increased centralization of industry, and a monopoly of Government business, if not all business, in the hands of the larger companies situated in the great industrial centers.[55] Particular apprehension was expressed [56] because the Secretary of Labor, in testifying before the sub-committee, had clearly indicated that she was opposed to any geographic wage differentials and, if the bill were passed, would tolerate them only in large zones, if at all.[57]

(4) *Regional and Sectional Wage Differentials.* Like objections were voiced by many witnesses who

[51] *Ibid.*, pp. 430-432.
[52] *Ibid.*, pp. 409, 426.
[53] *Ibid.*, pp. 393, 426-430, 250-251, 291.
[54] *Ibid.*, pp. 405, 426, 428, 430-432, 393.
[55] *Ibid.*, pp. 237, 250-251, 393, 404-12, 422-436.
[56] *Ibid.*, pp. 410, 429.
[57] *Ibid.*, p. 226.

pointed out that the bill would permit the Secretary to ignore regional and sectional wage differentials arising out of differing economic conditions, and economically necessary to the continuance of industry in such sections or regions.[58]

(5) *Interference with Procurement—Monopoly.* The Committee was repeatedly advised that grave injuries to the procurement activities of the Government itself might result from the bill.[59] Without regard to sweatshop operators, it was pointed out that competition for Government work would inevitably be narrowed if reputable manufacturers were compelled to depart from their existing, locally prevailing standards in order to obtain Government work, since to change would weaken their ability to compete for private business.[60] It was also pointed out that, if required so to change, many such manufacturers could not successfully compete with those more favorably situated geographically or operating under differing conditions of production.[61] In this connection it is significant to note that representatives of the Navy and War Departments, who appeared and criticized the bill, expressed apprehension that, for these and other reasons, it would unnecessarily interfere with their procurement activities by narrowing the field of bidders and increasing prices.[62] They and other witnesses pointed out that every additional restriction tended to diminish the number of bidders on

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[58] *Ibid.*, pp. 249, 291, 293, 295, 309, 393, 488, 492.
[59] See, e.g., Hearings, pp. 166-170, 179-180, 275, 308, 393, 394.
[60] *Id.*, 275, 308, 359, 394, 492.
[61] See note 55, *supra*.
[62] *Id.*, 179, 181, 185, 166-168.

Government contracts, and urged that the Committee proceed with caution.[63]

(6) *Craft Wages.* The provision of the bill authorizing the Secretary of Labor to fix the wages of every classification of employees engaged in the performance of a contract was also severely criticized,[64] not only on the ground stated in (2) above, but also on the ground that any such attempted classification would create hopeless confusion and unnecessary complexity in administration and enforcement. Classifications of workmen, and the degree of skill required to qualify for any classification, it was pointed out, would vary between sections, towns and plants.

(7) *Sub-contractors.* The provisions of the bill applying to sub-contractors, including its requirement that prime contractors cancel contracts of non-conforming sub-contractors, were strenuously objected to, on the grounds that they would create grave difficulties of enforcement and would place an unfair burden on prime contractors, which would not be assumed.[65]

(8) *Contracts Covered.* It was urged that construction contracts should not be subject to the bill, since already covered by the Bacon-Davis Act and the Eight-Hour law.[66] It was also strongly recommended that, if any legislation applicable to supply contracts should be reported by the Committee,

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[63] See note 62. See also Hearings p. 185, 237, 399, 459, 487.

[64] *Id.*, 166-167, 254, 397.

[65] *Id.*, 254-255, 486.

[66] *Id.*, 514-515.

the legislation should be limited in its coverage to contracts for amounts substantially in excess of the $2,000 limit provided in the pending bill.[67] It was contended that the pending bill would bring so many supply contracts within its purview that insuperable problems of inspection and enforcement would be created.[68] The net result, it was stated, would be that the unscrupulous law-evader would profit at the expense of the scrupulous business man.[69] A $10,000 limitation was suggested by representatives of the War Department and industry.[70]

As hereinafter shown, the Committee, in its subsequent revision of the bill, made changes to satisfy each of the above objections except the first, namely, that there should be no wage or hour regulation at all.

(d) The Committee reaction to the testimony; careful inquiry into the operation of the Bacon-Davis Act.

The record of the hearings shows clearly that members of the subcommittee and of the Judiciary Committee in attendance were much impressed by this barrage of objections[71]. Various witnesses were asked, in substance, by both majority and minority members whether the bill might not properly be limited to the prohibition of child labor and the other relatively non-controversial matters re-

[67] See, e.g., Hearings, pp. 166, 259, 487.
[68] See note 67, *supra*.
[69] See note 67, *supra*.
[70] See note 67, *supra*.
[71] See, e.g., Hearings, pp. 248 (Mr. Sumners), 250-251 and 294 (Mr. Chandler), 388 (Mr. Duffey), 390 (Mr. Walter), 480 (Mr. Chandler).

ferred to above [72], and/or if its wage provisions might not properly be so restricted as to make applicable to supply contracts the basic principles of the Bacon-Davis Act, i.e., the required payment of a wage prevailing at the place of performance of the contract.[73]

In this connection, it is significant to note that the Secretary of Labor and a number of other witnesses were examined at length concerning the Bacon-Davis Act, its operation, administration and effect. The Secretary testified, among other things, as follows: [74]

"MR. HEALEY. Your department administers the enforcement of the Bacon-Davis Act, does it not?

Secretary PERKINS. Yes, sir; it does.

MR. HEALEY. In connection with that function you predetermine the prevailing wages for the various *localities* of the country for the building trades?

* * * * * * *

Secretary PERKINS. Yes, sir;

* * * * * * *

MR. HEALEY. Does it require a great personnel in your Department for the administration of that Act?

Secretary PERKINS. Not very large; no, sir.

MR. HEALEY. Have you had a great deal of difficulty in administering it?

Secretary PERKINS. *Surprisingly little.*

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[72] Hearings, pp. 292-293; 331-333 and 399 (Mr. Citron).

[73] *Id.*, pp. 184 (Mr. Hess), 331 (Mr. Citron), 390 (Mr. Walter).

[74] *Id.*, pp. 229-230.

MR. HEALEY. So no additional personnel is required for the enforcement of that particular act. Is that correct.

Secretary PERKINS. That is so far as the contracting agency is concerned. When a request for predetermination is received, the Department of Labor sends a referee to the project.

* * * * * * *

MR. HESS. Under the Bacon-Davis Act all you determine is the wages and hours prevailing in the *locality* where the building is to be constructed?

Secretary PERKINS. For *every classification* of work.

MR. HESS. But just in that one *locality*.

Secretary PERKINS. Yes, sir; just in that one *locality*. Of course, this is what happens. *The work is all over the country; it is scattered everywhere, and it means that we have to consider every part of the country.* But once you have held a hearing in an area and know what the general prevailing wages are in that large area you will find the correction is very slight. As between one town and another town in the same county, or in the same *State*, the difference is extremely slight. * * * (Italics ours)

Mr. W. E. Reynolds, Assistant Director of Procurement, testified [75] that from January 9, 1936, to January 17, 1936, contracting officers had requested of the Department of Labor predeterminations under the Bacon-Davis Act of the "prevailing wages in the locality in question" on 315 construction projects; that there had been some delay in that connection; but that, generally speaking, there

[75] *Id.*, pp. 233-234.

had not been a great deal of difficulty in administration.

Mr. Gerard Reilly, Acting Solicitor of the Department of Labor, testified regarding the effect of the Bacon-Davis Act, as follows: [76]

> "MR. HEALEY. Can you tell us something about the experience * * * with the enforcement of the Bacon-Davis Act?
>
> MR. REILLY. Yes. * * * The statute does not say anything about the use of local labor, but does require the *local* prevailing wage standard. Its effect has been to preserve *local* standards.
>
> * * * * * * *
>
> MR. MICHENER. Prevailing wages in the *community?*
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> MR. REILLY. Yes." (Italics ours.)

(e) The employment of the terms "locality" and "community" during the hearing.

It will be observed that during the foregoing colloquies both Representatives Healey, Hess and Michener, on the one hand, and the Secretary of Labor and other witnesses, on the other, described the territorial units within which prevailing wages are determined under the Bacon-Davis Act as "localities" and "communities"; and that the Secretary of Labor referred to a state as a "large area".

This employment of terminology was characteristic of the entire hearing. Members of the subcommittee and Committee [77] and witnesses, offi-

[76] *Id.*, pp. 128-130.

[77] See, e.g., Hearings, pp. 234, 236, 245, 248, 249, 255, 371, 375.

cial and unofficial,[78] repeatedly characterized the unit for wage determination under the Bacon-Davis Act as the "locality" or "community" in which the work in question was to be performed; used the terms "locality" and "community" interchangeably; and, in thus employing such terms in their commonly-accepted sense, fully understood that they were describing small, local geographical areas, such as cities, counties, etc.

(f) The testimony bearing on practicality of administration.

It will also be observed from such colloquies that the Secretary of Labor testified most emphatically that no undue administrative burden had been cast upon her Department by the requirement of the Bacon-Davis Act that prevailing wages should be determined for every classification of employment on construction projects in the hundreds of localities scattered throughout the nation. Indeed, although conceding that the pending measure was very "complex",[79] in that it would have authorized the fixing of wages and hours, in the light of the standards imposed, for every classification of labor in virtually every industry in the United States, she and her associates in the Department of Labor expressed a willingness to undertake the task and the conviction that the Healey Bill and the Walsh Bill were "administratively workable".[80] The Secretary and her associates did sug-

[78] See, e.g., Hearings, pp. 187, 212, 233, 237, 255, 291, 302, 304, 327, 328-329, 342, 361, 373, 393, 397, 404, 406, 423, 425, 427, 429, 433.

[79] Hearings, p. 232.

[80] H. R. Hearing on S. 3055, 74th Cong., 1st Ses., at p. 13.

gest, however, that the bill should be amended so as expressly to provide that wage stipulations should not be inserted in contracts until applicable wage "findings" had been made after unhurried hearings that would permit action on a "scientific basis".[81]

Other witnesses appearing before the Committee, including William Green, President of the American Federation of Labor, stated that it would be a simple task for the Department to ascertain "what the prevailing rate of wages is in every city or town in the United States" [82] and that "in most every community * * * it is easy to determine what is the wage paid in * * * different industries".[83] Members of the Committee and subcommittee expressed the same view.[84]

On the other hand, Mr. Reilly, Acting Solicitor of the Department of Labor, pointed out the self-evident fact "that in advertising a contract which has no fixed situs * * * it would be difficult to know in just what *locality* the work would be done" [85]; and certain witnesses therefore urged that the requirements of the Bacon-Davis Act could not practically be extended to supply contractors, since to do so would virtually require the Secretary of Labor to pre-determine the prevailing wage for each classification of industrial employment in each locality in which the particular industry was carried on.[86]

Still other witnesses, who were violently opposed

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[81] Hearings, p. 125.
[82] *Id.*, p. 285.
[83] *Id.*, pp. 372-373.
[84] *Id.*, pp. 249-250.
[85] *Id.*, p. 180.
[86] *Id.*, pp. 396-397.

to the bill in its existing form, stated that if such procedure could be worked out practically, they would have no objection to it.[87]

4. The revision of the Healey bill by the House Judiciary Committee in the light of such hearings; the report of the revised bill as an amendment, in the nature of a substitute, to the Walsh bill; and the enactment of such amendment, substantially as reported, as the Walsh-Healey Act.

After such hearings H. R. 11554 was entirely rewritten by the House Judiciary Committee and on June 5, 1936,[88] was reported to the House, as so rewritten and without further hearings, as an amendment, in the nature of a substitute, to S. 3055. The bill, as reported, was, in all respects here material, in exactly the same form as that subsequently passed by the House and Senate. The Committee, in rewriting the bill, thus, *inter alia*,

(a) added to the bill provisions prohibiting in terms or in effect the following practices with respect to, or in the performance of, the contracts subject thereto: bid brokerage, home work, and work under unsanitary, hazardous or dangerous working conditions as, in substance, prohibited by applicable State law (§ 1(b), (e));

(b) eliminated from the purview of the legislation construction contracts, which were already covered by the Bacon-Davis Act (as to wages) and

[87] *Id.*, pp. 292, 300.

[88] H. R. Report No. 2946, 74th Cong., 2nd Ses.

the Eight-Hour law (as to hours); contracts for supplies in an amount of $10,000 or less (§ 1); and operations of sub-contractors;

(c) withdrew from the Secretary of Labor all authority to fix wages or hours under the vague standards provided in the original bill, or otherwise;

(d) definitely provided for the 8-hour day and 40-hour week (§ 1, (c)), subject to increase only under specific exemption to be granted by the Secretary of Labor (§6);

(e) definitely limited the requirement with regard to the minimum wages to be paid under any contract to the prevailing minimum wages on similar work or in the particular or similar industries or groups of industries in the locality in which the contract work was to be performed (§ 1(b)); and

(f) expressly provided that minimum wage stipulations should be included only in contracts relating to such industries as should theretofore have been the subject matter of a wage determination by the Secretary of Labor (§ 11).

A rule for consideration of, and limited debate upon, the revised bill was reported by the House Rules Committee and agreed to on June 18, 1936.[89] On the same date the bill was debated and agreed to, without material change, by the House sitting as a Committee of the Whole.[90] Without further debate the bill was formally passed by the House on June 19, 1936.[91]

The House amendments were concurred in by

[89] 80 Cong. Rec. 9991-9995.
[90] 80 Cong. Rec. 10001-10026.
[91] 80 Cong. Rec. 10201.

the Senate, without debate, on June 20, 1936.[52] On June 30, 1936, the President signed the bill.

C. The reasons for, and the significance of, the Judiciary Committee's revision of the Healey bill; the purposes of the legislation, as so revised and enacted; and the meaning necessarily to be assigned to its material provisions in the light of its legislative history.

1. The general purpose of the Committee in revising the Healey bill and of the legislation thus framed.

In the light of the testimony at the hearings, a mere cataloguing of the changes made in the Healey bill by the Committee (see pp. 92-93, *supra*) demonstrates that the purposes of the Committee in effecting its revision were: first, to incorporate in the legislation the additional prohibitions against sweatshop practices which were not included in the original bill but which received general approval at the hearings (p. 77-78, *supra*); and second, to satisfy each of the major objections, made at the hearings and listed above (supra, pp. 80-86), to the earlier draft of the measure, except one, viz: that the bill should not regulate wage and hour standards of Government contractors at all.

The Committee thereby sought to fashion a measure which, though not necessarily a perfect or permanent solution of the social, economic and political problems involved, was nevertheless a constructive compromise which would be definite in its terms, would command general acceptance,

[52] 80 Cong. Rec. 10538.

could be effectively enforced and would not unduly interfere with Government procurement in attaining social objectives.

The philosophy underlying this approach of the Committee may thus be summed up as follows:

The Committee, like all decent Americans, deplored the sweatshop and its characteristic practices,—long hours, low wages, unsanitary working conditions and child labor. It also believed that a work week longer than that then generally observed [93] and wage-cutting were detrimental to the national welfare. It was concerned with the asserted tendency of Government procurement to promote such evils and to discourage fair employers from maintaining decent labor standards. It desired to encourage such employers.

But like all practical Americans, the Committee wished to attack such evils and provide the desired encouragement without creating new and possibly greater problems and evils. It did so by recommending action of carefully defined scope in a carefully limited field, thoughtfully delineated in order to avoid the pitfalls brought to its attention at its hearings. *Thus*, and *only thus*, were the evils to be attacked and the desired encouragement afforded.[94]

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[93] See 80 Cong. Rec. 10002, 10004, for statements by Representatives Healey and Walter that the eight hour day and forty hour week were generally observed.

[94] The argument of petitioners completely ignores these considerations. They urge, in effect, that, because the Committee and the Congress which acted on its recommendations were against sweatshops, the measure fashioned by the Committee should be interpreted to confer a roving commission upon the Secretary of Labor in her discretion and without statutory guide to compel either the manufacturers in any hamlet or manufacturers in the entire United States, or any part thereof, to agree to pay the same wage in competing for Government contracts.

As stated by the Committee in its report: [95]

> "The object of the bill is to require persons having contracts with the Government to conform to *certain labor conditions* in the performance of the contracts and *thus* to eliminate the practice under which the Government is compelled to deal with sweatshops." "* * * * in recent months the requirement that Government contracts *must* go to the lowest bidder, regardless of his labor practices, has tended to depress the advance in wages and purchasing power achieved during the first 2 years of the administration. Passage of this bill will end the present paradoxical and *unfair* situation in which the Government on the one hand urges employers to *maintain and uphold fair labor standards*, and on the other hand gives vast orders for supplies and construction to the lowest bidder, often a contractor or manufacturer whose own labor policies offend *all decent social standards*." (Italics ours.)

2. Limitation by the Committee of the scope of the legislation.

This approach of the Committee is graphically illustrated by its limitation of the field in which the pending legislation should operate. Thus, in recommending the legislation, the Committee took an important step toward remedying the evils with which it was concerned and providing the desired encouragement to employers maintaining the prescribed standards.

But none of the prohibitory or regulatory provisions of the bill was given sweeping application. On the contrary, through the Committee's amendment of the Healey bill, it was limited in its appli-

[95] H. R. Report No. 2946, 74th Cong., 2nd Ses., p. 4.

cation to contracts for supplies in excess of $10,000 and, even in respect of such contracts, it was not to apply to the work of sub-contractors.[96] The Committee thus deliberately excluded from the purview of the legislation more than 99% in number of the Government's supply contracts[97] and the work of all sub-contractors manufacturing or furnishing supplies used in performing all such contracts.

The reasons for such limitation are perfectly clear. It was not that the Committee considered that the employment of child labor, or any of the other practices referred to above, is any the less an evil if resorted to by a contractor holding a contract for less than $10,000, or by a subcontractor. The limitation was imposed to avoid practical obstacles and other evils which, as disclosed by the testimony at the hearings, might have been created by broadening the scope of the legislation. (See pp. 82-86, *supra*.)

This, then, was not sweeping legislation of broad scope, but was a legislative compromise designed to operate in a limited, carefully defined field. Nor was the regulation within that field intended to be any less definite.

3. The deliberate withholding by the Committee of the broad power to fix hours and wages which would have been conferred by the Healey bill.

As we have pointed out above (pp. 58-59, *supra*), a mere examination of the measure as a whole shows that it was not intended to confer broad

[96] *Ibid.*

[97] See S. Hearing on S. 1032, 76th Cong., 1st Sess., p. 27.

discretionary powers on the Secretary of Labor. If that were not clear from the Act itself, the statements of those who sponsored or had charge of the bill on the floor of the House clearly show the Congressional intent in this regard. Such statements furnish irrefutable confirmation of the purpose of the Committee to meet and satisfy, by withdrawing ill-defined regulatory power and leaving no room for the play of real discretion, the objection that the earlier drafts of the measure conferred upon the executive a virtually unfettered discretion to fix hours and wages. They also confirm the belief of the Committee that it had done so in the revised bill by confining the function of the Secretary with regard to wages to one of fact finding as distinguished from wage-fixing and by definitely prescribing the maximum hours of labor, subject only to the power of the Secretary to grant exemptions in certain instances.

In commenting on Section 1 of the bill, the Report of the Committee stated (p. 4):

> "This section is the basic section of the bill. It differs from the corresponding section in the Senate bill * * * in that *it sets a definite limit to hours of employment and fixes a more definite standard with respect to minimum wages* * * *. (Italics ours.)[98]

Representative Walter, a member of the subcommittee of the House Judiciary Committee and one of the four members of the House authorized to explain the measure under the rule of limited

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[98] It will be remembered that the minimum wage standard in the Senate (Walsh) bill was itself much more definite than that in the Healey bill. See pp. 74-76, *supra*.

debate prevailing, explained the purpose of the Committee in definitely providing for an 8-hour day and 40-hour week as follows: [99]

> "* * * the very reason why 40 hours was written into the bill was to eliminate the argument that we were giving to any executive branch the authority to fix hours."

Representative Healey, Chairman of the subcommittee of the Committee on Judiciary, in explaining the bill to the House made plain that its wage provisions were completely dissimilar to those in the National Industrial Recovery Act, which had authorized wage-fixing and had conferred a broad and indefinite discretion upon the executive. He emphasized not only the definiteness of the wage standard in the pending bill, but also that the power conferred upon the Secretary of Labor thereunder was purely a fact-finding power. He stated:

> "* * * We have had a great deal of talk about this bill being a small N. R. A. bill for government contracts. This is absolutely not true. This bill does not set the standard for minimum wages by reference to the codes that obtained under N. R. A., but *definitely* sets it as the prevailing minimum wage for similar work or in the industries operating in the locality in which the contract is to be performed. The bill merely provides for a *proper* determination by the Secretary of Labor with respect to such prevailing wage. * * * " [100]

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[99] 80 Cong. Rec. 10004.
[100] 80 Cong. Rec. 10002.

> "* * * As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is." [101] (Italics ours.)

It would have been difficult to make a more unambiguous statement that the Committee conceived that it had conferred upon the Secretary of Labor and her associates a mere fact-finding power, which could be performed with mathematical or statistical accuracy and without the interplay or decision of important questions of policy or the exercise of broad, undefined discretion.

Representative Walter, the second of the speakers sponsoring and in charge of the legislation and who explained its provisions to the House, reinforced the statements of Representative Healey. He denied that there was any *possibility* of executive wage-fixing under the bill and affirmed that the only authority conferred on the Secretary of Labor was that of factually determining, as under the Bacon-Davis Act, prevailing rates of wages in each "community". He stated: [102]

> "* * * If there is any grave difference of of opinion with respect to any portion of this bill, it certainly comes with respect to the *possibility*, if you please, of the Secretary of Labor fixing wages. There is no member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but *there is nothing in this measure* that gives to any one in any executive branch *any* authority to fix

[101] 80 Cong. Rec. 10003.
[102] 80 Cong. Rec. 10004.

wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act. It has been a comparatively simple matter to go into each *community* in which government buildings are being constructed, and determine what every particular artisan is paid in that *community. The problem is the same here.* * * *" (Italics ours.)

4. The substitution, in lieu of the wage-fixing provisions of the Healey bill, of provisions embodying the basic principle of the Bacon-Davis Act, viz: required payment of a wage prevailing in the community in which the Government contract is to be performed.

From the language of the revised bill itself,—particularly when read in the light of the hearings held before the Committee,—and from the statements of Representative Walter, last quoted, and of others hereinafter quoted (pp. 104-110, *infra*), it is apparent that the Committee in its deliberations, while determining to impose wage regulation upon the Government supply contractors affected by the bill, likewise determined to apply thereto the basic principle of the Bacon-Davis Act.

The primary objectives to be attained by the legislation, as the Committee visualized them (see p. 94, *supra*), were: (a) to correct the tendency of Government procurement to encourage sweatshops, wage-cutting and longer work days; (b) thereby to attack the evils of sweatshops, wage-cutting and hour-lengthening; and (c)

thereby to encourage fair employers to maintain their decent labor standards. To the extent that such objectives were attained, the Committee thought purchasing power would be maintained or increased. The Committee was equally anxious, however, to avoid the many new problems and many new evils, including the limiting of competition for Government contracts, which witness after witness at its hearings had warned would flow from executive wage-fixing under a broad standard that would permit the wage-fixing authority to ignore differences in local, regional and sectional conditions and to fix uniform wages. (See pp. 82-84, *supra.*)

The adaptation to supply contracts of the basic principle of the Bacon-Davis Act was the obvious solution to the Committee thus seeking to steer between Scylla and Charybdis. In requiring payment of a wage prevailing in the community in which the work was to be done, the Committee guarded against wage-cutting to obtain or carry out Government contracts; encouraged the fair employer to maintain his existing wage standard; and obtained reasonable assurance,—that circumstantial guarantee underlying the entire prevailing wage concept,—that the Government would not be dealing with contractors paying unfair or sweatshop wages. And at the same time the Committee avoided the dangers which it was apprehensive might follow from adoption of the alternative presented in the original Healey bill, or any like alternative, of permitting the executive to fix wages without regard to local, regional and sectional wage differentials.

Petitioners' argument that Congress did not intend to carry into the Walsh-Healey Act the basic prevailing wage principle of the Bacon-Davis Act is based on the fact that the Walsh-Healey Act does not describe the unit for wage determination in the identical language employed in the Bacon-Davis Act, viz.: "city, town, village, or other civil subdivision of the State in which the work is to be performed"; but, instead, uses the term "locality", which is said to be highly flexible and to have been intended to embrace either a community or any larger geographical area (which may include the entire United States), depending on the circumstances of the particular case.

That argument ignores the fact that the unit for wage determination under the Bacon-Davis Act was repeatedly described in the hearings, both by members of the Committee, the Secretary of Labor and her associates, and other witnesses, as the "locality" or "the community"; that the terms "locality" and "community" were otherwise repeatedly used interchangeably in such hearings; and that both terms, in common usage, denote a small geographical area. It is not reasonable to suppose that the members of the Committee suddenly changed their usage, particularly when the particular terminology employed would determine one of the two pivotal issues developed at the hearings; when it would have been so easy to have omitted altogether the term employed or to have used some apt term, had it been the Committee's intent to confer upon the Secretary the vague, wage-fixing power which she now claims; and when every surrounding circumstance shows that it was the deliberate purpose of the Committee to withhold any such power.

But we are not left to inference. The statements on the floor of the House by those in charge of and sponsoring the bill show that the Committee did not change its usage; and reference to the debates further discloses that there was a common agreement and understanding among those who debated the bill that one of its important purposes was to apply to the Government supply contracts affected the basic principle of the Bacon-Davis Act.

We have already referred to the statements of Representative Walter, quoted *supra* at pp. 100-101.

Representative Citron, one of the members of the Judiciary Committee in constant attendance at the hearings and one of the members in charge of and sponsoring the legislation on the floor of the House (under the rule of limited debate prevailing) stated: [103]

> "* * * the Bacon-Davis Act * * * [provides] * * * that bidders for public works and public buildings cannot pay less than the prevailing rate in the *community* * * *.
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> * * * * * * *
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> "The bill before us is in substance an extension of the Bacon-Davis Act to all Government purchases amounting to over $10,000. * * *
>
> * * * * * * *
>
> "The bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those * * * (4) who pay less than the prevailing rate of wages in their *community* * * * ." (Italics ours.)

Representative Greenwood, the member of the Rules Committee who introduced the resolution

[103] 80 Cong. Rec. 10008.

containing the rule for consideration of, and limited debate upon, the bill, and who directed and controlled the debate on that resolution, stated:

> "Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey Bill * * *. It provides that no less than the minimum wage shall be paid to workers in the *community* where the supplies are manufactured or where the work is performed. * * *
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> * * * * * *
>
> "Briefly, Mr. Speaker, this is a type of social security that has been considered for a great many years. The Government in buying its supplies should lead the way in providing reasonable hours of work, limiting them to 8 hours a day and 40 hours a week, and should provide a minimum wage according to the scale prevailing in the *community*." [104] (Italics ours.)

In answering a question as to the meaning and purpose of the legislation, Mr. Greenwood showed the same clear understanding of the meaning of the term "locality" and of the basic principle of the legislation, as is demonstrated by the following colloquy: [105]

> "MR. MARCANTONIO. When the gentleman speaks of shortening hours, he does not, of course, advocate cutting wages. In other words, the gentleman believes in keeping wages as they are.

[104] 80 Cong. Rec. 9992.
[105] 80 Cong. Rec. 9993.

"MR. GREENWOOD. This bill provides that they shall pay the prevailing wages in the *community* where the work is performed; so the bill takes care of the very proposition of which the gentleman speaks." (Italics ours.)

The same common understanding is shown by the following colloquy between Representative Cooper of Ohio and Representative Healey: [106]

"MR. COOPER of Ohio. I should like to ask a question in regard to the power given the Secretary of Labor to fix minimum wages. Let us assume an industry in a certain *locality* that has some Government contracts. [Here the gavel fell.]

"MR. HEALEY. Mr. Chairman, I yield myself 2 additional minutes.

"MR. COOPER of Ohio. Let us assume an industry has some Government contracts and it is also manufacturing material for private sale. If there is not any other industry of like character in that *community*, will the Secretary of Labor fix the minimum wage that is now paid in that industry?

"MR. HEALEY. That is an administrative problem. As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is.

"MR. COOPER of Ohio. That is what I wanted to know about." (Italics ours.)

Such colloquy shows, beyond doubt, that both Representative Healey and Mr. Cooper were in common understanding on the proposition that the unit for wage determination was the "community". Had Representative Healey not proceeded on that assumption, but on the interpreta-

[106] 80 Cong. Rec. 10002-10003.

tion urged by petitioners that the entire United States or any portion thereof is a "locality" and that the Secretary of Labor may determine a wage for an industry throughout the United States, or in any such portion, no "administrative problem" would have been presented in the case inquired about by Mr. Healey's colleague.[107]

To suggest, therefore, as do petitioners (Br., p. 124-125), that Representative Healey did not entertain the view that a "locality" is a small geographical area [108] is tantamount to accusing him of evasiveness and bad faith towards his colleague. This is particularly true when it is recalled that Representative Greenwood, in urging adoption of the rule for the debate which Representative Healey controlled, had thrice told the House that such was the case. We refuse to place Representative Healey in that position.

Representative Sirovich, of New York, whose remarks are quoted and relied on by petitioners (see Appendix to Pet. Br., p. 23), showed the same understanding as all the previous speakers with

[107] The administrative problem presented would have been that of dealing with one of those uncommon borderline cases that arise in connection with the administration of almost every law. If investigation by the Secretary had confirmed that there were no similar industries, similar work, etc., in the community in question, the Secretary would have been obliged to accept as the prevailing minimum wage the minimum wage paid by the plant in question.

[108] That Representative Healey entertained this view is further shown by the fact that, in answer to a question, he indicated that prevailing wages would be determined for the "general locality" (as a county) of "a small point * * * in northeastern Iowa * * * a town of 4,500". 80 Cong. Rec. 10023. Petitioners (Br. 124) do not dispose of the significance of this colloquy by merely stating that it "lend[s] no support" to our position.

respect to the purpose of the legislation to apply the basic principle of the Bacon-Davis Act. He stated:

> "The Walsh-Healey Bill makes it mandatory for all agencies that deal with the United States Government to adopt the prevailing wages in the respective localities in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract. * * *[109]
>
> "The minimum wage law in this bill can fix wages, depending upon what the *local community* in that particular section where the contract is taken pays for similar work. * * *"[110]

The foregoing extracts from the debates confirm, beyond peradventure of doubt, that the term "locality", as employed in the statute, is used in its commonly accepted sense, that is to say, as synonymous with "community".

Petitioners' arguments that this Court must refuse to consider these statements in the debates is, we believe, without basis in law or common sense. They argue that none of the representatives making such statements, except Representative Healey, were persons "in charge of or sponsoring the legislation" within the rule that "where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation * * * to exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation * * *".[111] They fur-

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[109] 80 Cong. Rec. 10012.

[110] 80 Cong. Rec. 10015.

[111] Mr. Justice Brandeis in *Wright* v. *Vinton Branch*, 300 U. S. 440, 463.

ther argue that nothing said by Representative Healey shows that the term "locality", as used in the Act, means "community".

To this contention there are several answers, each of which is conclusive:

1. Representative Healey's remarks do show that the term "locality", as used in the statute, means "community".

2. Entirely aside from the remarks of Representative Healey, however, three of the other speakers were persons sponsoring or in charge of the legislation.

Representative Greenwood was the member of and spokesman for the Rules Committee without whose permission the bill could not have come to the floor. He introduced the rule authorizing consideration of the bill and limiting debate upon it. He was the majority member in charge of that debate and explained the terms and purposes of the bill, in urging adoption of the rule in question.

Representative Walter, of Pennsylvania, was not only a member of the Judiciary Committee, as indicated by petitioners (Pet. Br. p. 125), but was a member of the subcommittee which held the hearings on the bill. Moreover, he was one of the three spokesmen, in addition to Representative Healey, who, under the terms of the rule for limited debate "to be controlled by the chairman and ranking minority member of the Committee on the Judiciary," [112] were permitted to explain the terms of the bill and speak in its favor.

Representative Citron, of Connecticut, occupied exactly the same status as Representative Walter, except that the former, though not a member of

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[112] 80 Cong. Rec. 9991-9992.

the subcommittee of the Committee of the Judiciary which had held the hearings on the bill, was nevertheless constantly in attendance during such hearings and participated actively therein.

3. Regardless of this, however, it cannot successfully be gainsaid that the statements of Representatives Walter, Citron, Greenwood, Cooper and Sirovich, all made during the course of a short debate, show a general and common understanding that one of the most important purposes of the legislation was to apply to the Government supply contracts affected the basic principle of the Bacon-Davis Act that the contractor should pay his employees a wage prevailing in the community in which the work was to be done.[113] Accordingly, this Court is entitled to look to such statements as evidence of the purpose of the Congress in enacting the statute.

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[113] Petitioners rely on certain remarks of Representative Michener with regard to the meaning of the term "locality" as it is used in the Act (Br., pp. 126-127). He was a member of the minority and opposed to the Walsh-Healey bill, more especially the wage and hour provisions thereof. He conceded that it was a "milk-and-water proposition when compared with the Walsh bill" (80 Cong. Rec. Pt. 10 (74th Cong., 2d Sess.), p. 10005), for which it had been substituted in the House, and he feared that, if the bill should pass the House, the Senate would refuse to concur in the substitution and the Walsh bill, or its equivalent, would be resubstituted for it in conference. He was, therefore, diligent to point out what he conceived to be dangers in the bill, and it is not surprising that he should have seen the danger that the term "locality" might be misconstrued, as indeed it has been. He himself was under no misapprehension as to the proper meaning of that term, because in his remarks made on the floor of the House shortly after the remarks which petitioners quote he said (*ibid.*, p. 10006): "I am a great believer in *local* government and in *local* responsibility. Leave to the *locality* everything that is possible and *local* responsibility

D. The Secretary's construction of the Act and the Determination based thereon are in the teeth of the Congressional intent and give rise to the very evils that it was the Congressional purpose to avoid.

The legislative history of the Act thus clearly confirms that the interpretation placed upon it by the court below is correct and that that interpretation, and only that interpretation, can effectuate the Congressional purpose in passing the Act. Such legislative history further shows that by the construction which the Secretary of Labor places upon the Act, and which petitioners here seek to support, the Secretary of Labor is deliberately attempting to usurp powers which Congress purposely withheld from her in passing the Act. As is amply demonstrated by the record in the instant case, such a construction will lead to the very results which those who so vigorously opposed the original Walsh bill and the succeeding Healey bill feared and which Congress sought to avert in substituting the provisions of the Walsh-Healey Act for the provisions of the Healey bill.

Under the construction contended for by petitioners the Act would confer upon the Secretary of Labor practically unlimited power to alter in her uncontrolled discretion the prevailing wage structure of industries throughout the country; to eliminate long prevailing wage differentials among localities in the country; and generally to dictate according to her own ideas of economy and social

in that *community* will as a rule do the job" (Italics ours). His insistence that further limitations should be included in the bill was prophetic, but it does not show that there was any real disagreement in Congress as to the proper meaning of the term "locality".

justice the wage rates that shall be paid by those who contract for Government work within the scope of the Act.

In short, petitioners' construction of the Act would change it from a prevailing wage statute to a wage fixing statute. Nor is that radical departure from the Congressional intent the only harm that can result from this attempted usurpation of power. There is good reason to believe that, if the Secretary of Labor shall persist in disregarding the plain terms of the Act by attempting to impose upon Government contractors minimum wage rates in excess of those which prevail in their localities and are paid pursuant to collective bargaining agreements, many of such contractors will find themselves unable to continue to compete for Government business and competition for Government contracts within the scope of the Act will be seriously curtailed and Government procurement seriously impeded.[114]

It does not require penetrating analysis to discern who will first bear the blow. Unless the present usurpation of power be checked and the Act cease to be administered so that "the prevailing minimum wages found" are "shaped primarily by the large integrated operations of the larger companies" (R. 205), the future in Government business of smaller, local industry is indeed insecure.

[114] As Captain C. W. Fisher, of the Construction Corps of the United States Navy, testified on May 13, 1939, at a hearing before the Senate Committee on Education and Labor on S. 1032 (76th Cong., 1st Sess.): "The minimum-wage determination in the iron and steel industry practically eliminated competition in the industry while it was in effect. * * * Bidding is now normal due to the temporary injunction suspending this wage determination." [Hearing on S. 1032, 76th Cong., 1st Sess., p. 40]

IV

There has concededly been no consistent administrative interpretation of the Act, and the mere fact that results consistent in their illegality with those reached in the Determination were also reached prior thereto through a concededly improper interpretation of the statute affords no justification for the changed, but equally improper, interpretation adopted in the Determination.

Petitioners complain that the court below was "grossly in error" in rejecting their contentions (a) that the statute has received a consistent administrative construction, and (b) that the interpretation thereof on which the Determination was predicated should, therefore, be sustained (Br., pp. 128-131). They seem to feel particularly grieved that the court below considered that the construction of the statute urged by them herein was first adopted in the Determination itself, exactly forty days prior to the commencement of suit by respondents.

The facts with respect to this charge of "gross error" are as follows:

Commencing with the first wage determination under the Act, "*In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*," 2 Fed. Reg. 233, made on January 30, 1937, and thereafter to the date of the Determination, the Act was "construed" by the Secretary and, quite naturally, by her subordinates in the Department of Labor, as follows: The words "currently operating in the locality" etc. were held to modify only the words "groups of

industries" in that portion of Section 1(b) of the Act requiring contractors to pay their employees

> "* * * not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular of similar industries or groups of industries currently operating in the locality in which the * * * supplies * * * are to be manufactured or furnished under said contract * * * *."[1]

On the basis of this "interpretation", paralleled in legal annals only by such remarkable feats of statutory construction as that performed by the Gilbertian Chancellor, the Secretary proceeded to make a series of wage determinations in which she determined "prevailing minimum wages" in various industries either for the entire United States,—as was generally the case,—or, at most, in three great geographical divisions thereof.[2] Contrary to the statement made at page 129 of petitioners' brief, the Secretary never even purported

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[1] In the determination cited in the text, the Secretary stated (at p. 234 of 2 Fed. Reg.): "In this connection the Department has had the assistance of an opinion of the Solicitor of Labor, rendered at my request, in which the phrase 'currently operating in the locality', as used in section 1 (b) of the Public Contracts Act, is construed. The Solicitor has advised me that in his opinion the phrase in question limits or modifies only the phrase 'groups of industries', and in no way affects the clause 'persons employed * * * in the particular or similar industries'."

[2] *In the Matter of Determination of Prevailing Minimum Wages in the Dimension Granite Industry*, 2 Fed. Reg. 2976 (Dec. 22, 1937).

to determine wages in "localities" in any of such cases.

Such "interpretation" was, in form, abandoned in the Determination, presumably because it was conceived that it was hopeless further to deny that the authority of the Secretary of Labor under the Act was limited in all cases to the determination of prevailing minimum wages in "localities".[3] In any event, it is now admitted that "it is apparent that the more recent interpretation of the Secretary better comports with the statutory language" (Br., p. 131): and, regardless of any concession, it is manifest that such earlier "interpretation", which petitioners now make no effort to defend, was altogether improper.

To the date of such changed "interpretation" of the statute, even the Secretary of Labor had apparently understood that a "locality" was a small geographical area.[4] Indeed, the desire not to be hampered in her wage fixing activities by a mere statutory requirement that wages be determined only in "localities" had, no doubt, furnished the motivation for her earlier "construction" of the Act.

However, as soon as it was admitted that the Secretary's power did not extend beyond "localities", that term was forthwith expanded in the Determination to encompass either the entire United States or any region thereof deemed appropriate by the Secretary. This was to obtain "re-

[3] This contention was strongly pressed by the steel companies, including respondents (R. 237), during the argument preceding the Determination.

[4] See "The Prevailing Minimum Wage Standard", O. R. Strackbein, member of the Public Contracts Board, at pp. 70-71, quoted at p. 43, *supra*.

sults" "wholly consistent" with those obtained under the earlier "construction" (see Br., p. 131; Pet. Cert., p. 17, note 5). Thus, by the simple process of "construction" the term "locality" was excised from the statute for the second time.

We believe that the court below was thoroughly justified in holding that the interpetation of the statute urged upon it, and urged here, has not been one consistently adhered to; but, on the contrary, had been adopted for the first time in the Determination. We believe, also, that the Determination was disingenuous in its implication that the construction of the term "locality" adopted therein had theretofore been consistently followed, (R. 245),—a disingenuity likewise characteristic of petitioners' brief in the District Court (see p. 10, *supra*).

But regardless of this, the construction of the statute, if consistent, has been consistently wrong. As such, it is of no avail to petitioners herein.[5]

The only real element of consistency in the administration of this statute by the Secretary of Labor and her subordinates is to be found in their consistent effort to flout the Congressional purpose and to usurp power not confered by the statute. We believe that the following extract from the book recently written by a member of the Public Contracts Board typifies the spirit, fostered by the Secretary, with which the Act has been administered.

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[5] *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330-331; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. R.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific Ry.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661.

> "Does the Public Contracts Act make mandatory the determination of prevailing minimum wages by localities? If so, the interpretation made by the Department of Labor was in error. But assuming that the locality-standard was intended by Congress, it may still be questionable whether the locality is the proper geographical unit for the wage determination in view of the object of the Act. If the Department of Labor's interpretation contravened the clear meaning of the statute, is the Department's interpretation more suited to attainment of the law's object than the allegedly clear wording of the Act?" [6]

And we further believe that the following inadvertent statement by that gentleman, appointed by the Secretary of Labor to assist in the administration of the Act, subject to her control, explains fully the reason why the Secretary of Labor has consistently violated the command of the statute:

> "Of course, it is possible that the interpreter might have had in mind a standard different from the one specified in the statute; and then made his interpretation gratuitously in order to shape the statute to his own predilection." (*ibid.*, p. 35)

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[6] See "The Prevailing Minimum Wage Standard", *supra*, at p. 34.

V.

The construction of the Act for which petitioners contend would render the administration of the Act much more difficult than that for which respondents contend.

Petitioners argue that, in determining whether the construction of the word "locality" for which respondents contend accords with the Congressional intent, the Court should consider the administrative difficulties which petitioners claim would result from such a construction (Br., pp. 132-134).

As the court below quite properly said, considerations of administrative convenience do not constitute any reason for "disregarding the clearly expressed intention of Congress" (R. 393). Since we have already shown that the construction for which petitioners contend is clearly contrary to the intention of Congress as expressed in the Act and as shown by its legislative history, the fact that such construction may cause difficulty and inconvenience in the administration of the Act is entirely irrelevant.

However that may be, the fact is that the construction of the Act for which petitioners contend and on which the Determination is based would render the Act much more difficult of administration than the construction for which respondents contend.

Petitioners claim that under the latter construction it will be necessary for the Secretary of Labor to determine the prevailing minimum wages for each of the thousands of local centers of manufacture throughout the country. They concede, what

is in fact shown by the record in this case, that the task would not present serious difficulty even in an industry which is as widespread as the iron and steel industry. They cite as a "horrible example", however, the flour industry with 2,193 flour mills, which they say are located in 1,129 of the 2,053 counties in the country (Br., pp. 120 and 133-134).

According to the Report of the Public Contracts Board in the instant case, wage data were received from 234 of the 461 plants "considered to be within the purview of the industry", and the reporting plants accounted for "approximately 85 per cent of the nation's capacity to produce pig iron, 90 per cent of the steel ingot capacity, and 90 per cent of the capacity to produce hot rolled products". The Board further stated, "We have no doubt as to the sufficiency of the wage data in the record to give us an adequate view of the number of workers employed in the industry, the number being paid the various base rates, and the various base rates in the industry". (R. 117)

All of such data were furnished voluntarily and the record before the Board (including the filing of numerous briefs) was completed within a period of 42 days after July 11, 1938, the date of the notice of the hearing before the Board. The iron and steel industry is the largest industry for which the Secretary of Labor has yet undertaken to determine prevailing minimum wages under the Act and the record shows that the task of determining such prevailing minimum wages by "localities", as respondents contend that term should be construed, does not present any serious administrative difficulties. It may fairly be assumed that in citing the flour industry petitioners selected the worst possi-

ble example, and yet the task of determining prevailing minimum wages in 2,193 flour mills is nothing to what the Works Progress Administration has undertaken and accomplished in determining prevailing wages for various classifications of labor in communities throughout the country.

Whatever may be the burden that would be imposed on the Secretary of Labor by respondents' construction of the statute, however, it is far less than that which the Secretary seeks to assume by her construction. Since the real effect of petitioners' construction is to read the term "locality" out of the Act, it was to be expected that they would not offer any alternative definition of that term. They do say that, "Since there are as many possible places of performance of a supply contract as there are different bidders for the contract, in advance of the award of such a contract the 'locality in which the materials * * * are to be manufactured * * *' is *prima facie* as broad as the area within which all of the possible bidders are located." (Br., p. 117). They assert, however, that "even in cases where manufacturers are diffused throughout the nation, it does not follow that the locality determined by the Secretary must be the entire nation." (Br., p. 121). As they point out, transportation costs "may limit the effective marketing area" and other economic characteristics "may reveal fairly well-defined competitive areas within the industry" (Br., p. 121). They also express concern over the "runaway shop" evil and assert that the effective "elimination of the competitive advantages of this practice can only be accomplished by making it unprofitable for industry to migrate solely for the purpose of achieving low wage costs." (Br., p. 119).

Thus, under the construction which petitioners seek to place on the Act, the Secretary of Labor must collect minimum wage data for all places at which plants in the industry in question are located, because "*prima facie*" the area within which all of the possible bidders are located must be taken into account, which is not less than she would be required to do under respondents' construction of the Act. Beyond that, however, under petitioners' construction of the Act, in order to determine the extent of those "fairly well-defined competitive areas within the industry" for which the prevailing minimum wage shall be determined, the Secretary must collect a great amount of additional data as to transportation costs, marketing areas, sources of raw materials, possibilities of migration from high wage areas to low wage areas and all the other economic characteristics of the industry which necessarily bear upon the question as to the extent of the respective regions within which the respective minimum wage rates should prevail.

As the record shows, neither the Public Contracts Board nor the Secretary of Labor made any attempt to collect such data in the instant case.[1] On the basis of the criteria offered by petitioners in support of their construction of the Act, therefore, the present Determination is clearly arbitrary and capricious, and it may fairly be said that petitioners' contention that their construction of the Act will present less administrative difficulty than the construction urged by respondents can only be supported on the assumption that the Sec-

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[1] On the contrary, respondents' application to reopen the hearing and furnish data of that character was denied (R. 31-32, 20-21, 218-230).

retary of Labor will in each case arbitrarily determine the extent of the respective "localities" in which to establish uniform minimum wages without regard to the numerous economic factors which petitioners claim require their construction in order to effectuate the purposes of the Act.

The difficulties involved in supporting a determination under petitioners' construction of the Act are well illustrated in petitioners' attempt to support the instant Determination by an analysis of the bidding on 72 Government steel contracts (Br., pp. 144-152). In spite of the fact that such analysis shows on its face that a great deal of time was devoted to its preparation, it now appears that it was so inaccurate that petitioners have revised it and, in doing so, have found it necessary to eliminate over one-fifth of such contracts. And yet any attempt by the Department of Labor to ascertain with any degree of accuracy the nature and effect of the great diversity of economic factors which determine the extent of the areas within which prospective bidders on Government contracts may effectively compete for those contracts would be fraught with infinitely greater difficulties than those which were encountered in the preparation of that analysis.

The contention that respondents' construction of the Act must be rejected because of the administrative difficulties which it would involve is thus without foundation in fact. Petitioners' construction would present even greater administrative difficulties, unless indeed it be assumed that the Secretary of Labor would arbitrarily determine the extent of the "localities" within which the minimum wages shall prevail, as the Acting Secretary

actually did in this case and as the Secretary has apparently done in the ten determinations which have become effective since March 27, 1939, the date of the injunction in this case, copies of which determinations have been filed with the Court by petitioners.

VI

Even if the Act were construed to authorize the Secretary of Labor to determine prevailing minimum wages in an area as large as the Thirteen State Area, in cases in which the relevant economic facts made such a determination necessary or appropriate to carry out the purposes of the Act, as so construed, the Determination would nevertheless be beyond the authority of the Secretary, since utterly arbitrary and in the teeth of the statute.

It is well settled that the power or discretion vested in an officer by statute may not be exercised by him in an arbitrary or capricious manner (see pp. 231-237, *infra*). Any such action is, in a true sense, beyond the authority of the officer, for the reason that the law never confers an authority to act arbitrarily or capriciously (*ibid.*). This is apparently conceded by petitioners (Br., p. 152). While arguing that the Act authorizes the determination of prevailing minimum wages in areas as large or larger than the Thirteen State Area, they nevertheless admit that in delimiting the areas within which to determine such wages it is the "duty" of the Secretary "to reach a reasonable judgment based upon" relevant considerations (*ibid.*).

It is our contention that even if the Act be construed to permit, in a proper case,[1] the determination of prevailing minimum wages in an area as large as the Thirteen State Area, the decision in

[1] That is, a case in which the relevant economic facts make a determination for such a large geographical area necessary or appropriate to carry out the purposes of the Act, as so construed.

the Determination to establish a uniform minimum wage for the Iron and Steel Industry in the Thirteen State Area was utterly unreasonable, arbitrary and, indeed, in the very teeth of the statute, as so construed.

We predicate this argument upon the Determination itself, which states the reason for such action, and upon the facts found therein and in the Report of the Public Contracts Board relied on in the Determination. No question is presented in this case as to the sufficiency of the evidence to support any such finding, or otherwise, as petitioners seem to imply (Br., pp. 139, 144 *et seq.*).

In judging of the validity of such action, this Court is, of course, entitled to consider in its context the reason given therefor as aforesaid, even if (as we believe not to be the case [2]) the Secretary is not required by the statute to accord a hearing, or find facts, or explain her action. As stated by Mr. Justice Holmes in *Gegiow* v. *Uhl*, 239 U. S. 3, 9: [3]

> "The courts are not forbidden by the statute to consider whether the reasons *when they are given*, agree with the requirements of the Act. * * * And when the record shows that a Commissioner of Immigration is exceeding his power, the alien may demand his release * * * ." (Italics ours.)

Apparently recognizing the vulnerability of the Determination, petitioners, in their brief as originally filed, argued, in substance (pp. 142-143), that, regardless of whether it could reasonably be

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[2] See pp. 193-210, *infra*.

[3] This case and other like cases are discussed in greater detail at pp. 170-171, *infra*.

justified by what was said or found, therein or in the Report, it "would be valid if *any* state of facts reasonably *could be conceived* that would sustain it."[4] Pursuing this theory, petitioners, in effect, asked the Court to take judicial notice of various alleged facts with respect to the bidding upon, and award of, 72 Government iron and steel contracts, awarded during the period from January 1, 1938, to June 30, 1938. What were thought to be summaries of certain data with respect thereto were served on counsel for respondents, and the major portion of the argument in petitioners' brief devoted to attempted justification of the Determination, as well as various maps illustrating such argument, were based on such material. (See Br., pp. 147-152.)

Upon checking such data as to 9 out of the 72 contracts covered thereby, counsel for respondents discovered numerous errors in such data, which were brought to the attention of counsel for petitioners, who thereupon advised counsel for respondents that at the oral argument counsel for petitioners would request that the part of their brief relating to such contracts be not considered by this Court. Petitioners have since filed with the Court a Supplemental Statement, a copy of which was received by counsel for respondents on Saturday, March 30, 1940. Since counsel have not yet received any copy of the data covered by such Supplemental Statement, however, they have been unable to make any check thereof other than to

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[4] This argument is without foundation, as hereinafter shown (see pp. 236-238, *infra*). But even if valid in theory, it would be of no avail to petitioners herein, since in the light of the admitted facts, there is no basis which could reasonably be conceived to sustain the Determination.

note that such Statement eliminates from consideration 16 of the 72 contracts which were considered in petitioners' brief and that such Statement still includes at least one of the contracts the data with respect to which were found to be erroneous by counsel for respondents.

Respondents believe that the data contained in such Statement are not relevant on any of the issues in this case. Even if such data were relevant on any of such issues, however, respondents submit that, in view of the facts above set forth, such Statement should not be considered by this Court.

The only purpose of such Statement appears to be to show that bidders for the contracts considered therein were widely scattered and that, therefore, in order to accomplish the purpose of the wage provisions of the Act, it is necessary for the Secretary to prescribe minimum wages thereunder for large areas or regions. As we have pointed out elsewhere (*supra*, pp. 60-63), the assumption upon which such argument is based is contrary to the express provisions of the Act.

The Determination must, therefore, stand on its own feet.

We consider first the facts in the light of which the Determination was made.

A. The Determination seeks to establish a uniform minimum wage in the Thirteen State Area notwithstanding the facts, *inter alia*,

(1) that wage differentials of long standing, based on differing economic conditions, exist between various major regions therein in which iron and steel are manufactured;

(2) that the iron and steel industry is not a sweatshop industry and the minimum

wages paid therein in each of such regions are high wages; and

(3) that such differentials have existed for many years without endangering in any way the wage standards in the western regions in which higher wages have been paid.

Even if consideration be given only to large regions within the Thirteen State Area,[5] the wage data in the Report of the Public Contracts Board (R. 63-74; see also R. 255-258), upon which the Secretary relied in making the Determination (R. 314), show conclusively the existence of well-defined wage differentials between iron and steel plants located in the western portion (which includes Pittsburgh and is herein sometimes called the Western District[6]) of such area and those plants which were included by the Secretary in said area but which are also located in what are known in the industry as the "Eastern District", the "Buffalo District" and the "Johnstown District".

A description of such districts is set forth in the Statement (p. 18, Note 36). It will be recalled that the Eastern District includes the entire area of the United States east of Altoona, Pa., and north of Virginia, that portion of Maryland west of the Altoona line, and certain counties of West Virginia. The plants of all respondents are located in the Eastern District.

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[5] Analysis of the wage data set forth in the Report will also show differentials existing between various communities and districts in such large regions. See Appendix X and R. 255-258.

[6] See Statement, p. 18, and particularly Note 36 thereto.

The above-mentioned differentials are shown in the table set forth at pages 19 and 20 of the Statement and are reflected in Appendix X.

To summarize:

In *the Eastern District*, out of a total of 5,389 common laborers, 5,057 are paid at the rate of 56½ cents per hour or less, 194 are paid at the rate of 57c and only 138 are paid a wage in excess of such rate. Out of a total of 53,531 wage earners in the Eastern District, 45,729 are employed at plants in which the base rate of pay for common laborers is 56½ cents per hour or less, 4,005 are employed at plants at which such base rate is 57c, and only 3,797 are employed in plants in which such base rate is in excess of 57c.

Only three plants (out of 58) in the Eastern District, employing 115 common laborers and a total of 3,602 wage earners, pay common laborers as much as 62½ cents an hour.

In *the Buffalo District*, out of a total of 982 common laborers, 171 are paid at the rate of 55 cents an hour or less, 715 are paid at the rate of 59½ cents an hour and the remaining 96 are paid at the rate of 60 cents an hour. Out of a total of 10,879 wage earners in the Buffalo District, 1,412 are employed at plants in which the base rate of pay for common laborers is 55 cents per hour or less, 8,611 are employed at plants in which such base rate is 59½ cents, while the remainder are employed in a plant in which such base rate is 60 cents an hour.

In *the Johnstown District*, all the 603 common laborers are paid at the rate of 58½ cents per hour.

But, in *the Western District*, out of a total of 11,483 common laborers, 10,561 are paid at the

rate of 62½ cents an hour, and, out of a total of 155,755 wage earners, 149,319 are employed at plants in which the base rate of pay for common laborers is exactly 62½ cents an hour.

Thus, out of a total of 10,676 common laborers in the four districts paid at the rate of 62½ cents an hour, 10,561 are in the Western District. Out of a total of 6,262 common laborers paid at the rate of 57 cents an hour or less, 5,251 are in the Eastern District.

Mere examination of the wage data set forth above is sufficient to demonstrate that the wages paid in the iron and steel industry in each of such districts are relatively high wages,—particularly when it is borne in mind that the wages paid to the vast majority of the wage earners are higher than the base rates listed (R. 58). The steel industry is notoriously not a sweatshop industry (R. 215).

As hereinafter shown, the Department of Labor itself, in its numerous periodic surveys of rates of wages in the steel industry, has long recognized the existence of a geographic differential between the Pittsburgh District and the district east thereof in the area in question, and has also recognized that it arose from industrial conditions and not from the mere whims of the statistician.

The most recent description of such districts is contained in Bulletin No. R-380 (Reprint from Monthly Labor Review for April, 1936) of the Department of Labor which reads as follows: (at p. 3):

> "The Eastern District embraces the New England States, as well as a strip of territory along the Atlantic coast, including Mary-

land. More specifically, it covers plants in Massachusetts, Rhode Island, Connecticut, eastern New York, New Jersey, eastern Pennsylvania, and those located in and around Baltimore. The Pittsburgh District includes western Pennsylvania, eastern Ohio and the northernmost corner of West Virginia. Thus, plants in Pennsylvania, west of Altoona, as well as those along the borderline of Ohio from Youngstown south to Bellaire, Ohio, and those located in the panhandle of West Virginia, have been placed in this district."

Eloquent testimony as to the long continued existence of the differential between such districts is found in the following compilation from United States Bureau of Labor Statistics Bulletin (No. 513, Table 4, No. 567, Table 6 and No. 403, Table 3) of the average hourly earnings (in cents per hour) of common laborers in specified departments of the Iron and Steel Industry:

Year	*Eastern*	*Pittsburgh*	*Year*	*Eastern*	*Pittsburgh*
1907	13.4	15.4	1919	39.8	48.0
1908	12.0	15.6	1920	45.1	53.0
1909	12.3	15.2	1922	32.2	36.0
1910	14.2	16.4	1924	38.6	45.1
1911	14.1	16.6	1926	37.4	45.2
1912	14.4	16.7	1929	37.5	45.3
1913	15.7	19.0	1931	35.1	45.9
1914	15.6	19.0	1933	29.1	35.8
1915	15.5	19.0	1935	41.4	46.6
1917	27.8	30.1			

The Bureau has stated that the differential between such districts arose because of "industrial conditions" (Bulletin No. 567, December, 1932, p. 17); and that each "has its own peculiarities" (Serial No. R. 380, p. 3).

It is, of course, obvious, from the long continued existence of such differential,—and the fact that it exists because of differing economic conditions, —that the lower wages paid in the Eastern District in no way endanger the wage standard in the Western District.

At certain points in petitioners' brief (see, e. g., Br., p. 117), it is implied that, because of such wage differential, respondents or other manufacturers of iron and steel whose plants are situated in the Eastern District enjoy a "decisive competitive advantage" in bidding on Government contracts over those manufacturers located in the Western District. Consequently, it is implied that a uniform wage should be paid by manufacturers in both Districts in order that the wage standard in the Western District may not be impaired.

These implied suggestions have no basis in fact. They ignore the differences in industrial conditions in the two areas and the fact that the differential has existed for many years.

In this connection, we cannot emphasize too strongly that neither the Acting Secretary, nor the majority of the Public Contracts Board, made any finding that the wages paid by respondents, or any other manufacturers located in the Eastern District, conferred any competitive advantage, "decisive" or otherwise, in bidding on Government contracts. On the contrary, the minority of the Board stated,—and this statement was not challenged by either the Secretary or the majority,— that "no * * * showing has been made" that "these lower wage rates * * * confer a competitive advantage in bidding on Government contracts upon

the companies operating in the eastern area" (R. 214). The minority further stated,—and such statement was likewise unchallenged,—that "the forcible merging of the eastern with the western section would introduce a reallocation * * * with the effect that an unearned and gratuitous advantage would be given to one area at the expense of another." (R. 215)

While we do not believe that anything contained in petitioners' Supplemental Statement is relevant to the real issues in this case, it is worthy of note in this connection that, of the 39 contracts dealt with in the maps which are included in such Statement, 20 appear to have been awarded to bidders in localities in the Western District where the 62½ cent minimum wage rate predominates, although in the case of each of such contracts there were bids from one or more bidders in localities in the Eastern District where the minimum wage rate is 56½ cents or less. Two of such contracts were awarded to bidders in the Western District in cases in which there were no bidders from the Eastern District, and only 8 of such contracts were awarded to bidders in the Eastern District in competition with bidders in the Western District.

Petitioners, of course, did not submit such maps to show that steel manufacturers in the Eastern District do not enjoy any competitive advantage by reason of the prevailing wage differentials between localities in that District and localities in the Western District. Such maps, however, negative the existence of any such advantage and confirm the conclusions of the minority of the Public Contracts Board in that regard. Although re-

spondents have not been furnished with the data on which such maps are based and have not, therefore, had an opportunity to check such data, they believe that on this point at least the maps fairly reflect the facts.

As petitioners indicate in such Supplemental Statement (p. 6), the data therein set forth were submitted for the purpose of showing that "the Congressional objective of rewarding rather than penalizing the high minimum wage manufacturer can only be accomplished by the determination of the uniform minimum wage prevailing throughout an area in which it is realistically possible to say that the 'materials * * * are to be manfactured' and within which the payment of less than the uniform minimum standard may attract the place of actual performance away from the fair minimum wage standard employer".

The maps cover only a selected group of contracts and do not cover all the contracts for iron and steel products which were awarded during the six months period referred to in such Statement. It is not to be presumed, however, that the contracts were selected with a view to disproving the contention of petitioners and it is, therefore, to be expected that a complete analysis of all such contracts awarded during such period would even more decisively negative such contention.

We turn now to a consideration of the basis on which the Acting Secretary determined to disrupt the economic balance in the Thirteen State Area.

B. The only reason given in the Determination for the establishment of a uniform minimum wage in the Thirteen State Area is, in the light of the admitted facts, a palpably insufficient justification for such action.

In the Determination the single reason given,—i.e., the sole "economic fact" relied on,—to justify the establishment of a uniform wage in a "locality" consisting of the Thirteen State Area, is the following (R. 250):

> "The remaining states [i. e., the states and political subdivisions in the Thirteen State Area] * * * fall within *the great market dominated by Pittsburgh.* It has been urged both at the hearing before the Board and in the subsequent proceedings in this matter that the western portion of the state of Pennsylvania does not fall within the same locality as the eastern portion of the state and a finding of various different localities has been urged. *Yet the entire eastern market,* frequently referred to in the industry as the Pittsburgh district, *would seem to constitute a single locality,* both in terms of geography and *in terms of the markets predominantly served by the producing plants.*" [Italics ours.]

Presumably, the intended significance of this statement was that the manufacturers in the Thirteen State Area would be likely to compete with each other for the same Government contracts.

To accept this reason, standing alone as it does, as a valid reason for the determination of a uniform wage in the Thirteen State Area, would be to hold that the purpose of the Act is to require all manufacturers, wherever located and however different the conditions under which they may operate, to pay the same minimum wage if they are to bid on the same Government contract.

That such is not the purpose of the statute appears on its face; nor have petitioners adduced an iota of evidence that the Congress had any such intent. Indeed the Determination itself recognizes, in other connections, that such was not the purpose of the Act.

Thus, in selecting the areas embraced in four[7] of the other five so-called "localities" found by him in the Determination to be appropriate units for determining minimum wages, the Acting Secretary purported to recognize existing geographical wage differentials (R. 249; 247; 248). And, in the case of at least two of such "localities",[8] which adjoined, no consideration whatever was given to the question as to where the manufacturers therein marketed their products or with whom they competed (R. 248-250).

The explanation for the attempt in the Determination to establish a uniform wage for all iron and steel manufacturers in the Thirteen State Area is really very simple. The Secretary desired to raise the wages in 55 of the 58 plants in the east. Fulfillment of the Secretary's desires in this regard, however, was not one of the objects sought to be attained by the Act.

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[7] The so-called "trans-Mississippi locality"; the so-called "southern area"; the three west "coastal states"; and the eight "mountain states".

[8] The so-called "trans-Mississippi locality"; the states in the area "immediately to the East" thereof.

VII.

The Determination was not based on the fair and impartial hearing required by the Act.

As hereinafter shown (Point IX) the Act requires that wage determinations be based on fair and impartial hearings. Such a hearing was not accorded in this case.

The only document (other than the Report) referred to in the Determination was a report allegedly made to an annual meeting of stockholders of United States Steel Corporation (R. 31; 246). No such report was introduced in evidence during the hearings leading up to the Determination (R. 31).

The Acting Secretary apparently based his conclusion that the only "great market" east of Chicago was that dominated by the plants in the Pittsburgh District, either in whole or in part, upon a statement purportedly made in such annual report. Thus the only justification given by the Acting Secretary for his decision that 13 States, a portion of another, and the District of Columbia constitute a "locality" was based on matter not properly before him.

It is well established that consideration of material matter outside the record in an administrative proceeding invalidates the administrative action taken on the basis thereof (*United States and Interstate Commerce Commission* v. *Abilene & Southern Ry. Co., et al.*, 265 U. S. 274, 289, 290).

Consequently, even if the Determination were otherwise unassailable (as it is not), it would be invalid because of such unlawful action by the Secretary.

PART TWO—PROCEDURAL QUESTIONS

VIII.

Respondents' right to bid and negotiate for Government contracts and to conduct their business relations with the Government free from illegal interference has been unlawfully invaded, and is threatened with further unlawful invasion, by the unlawful action of petitioners. Consequently, they have standing to sue to protect such right and such business relations.

The primary contention of petitioners (Br., p. 18) is that, no matter how unlawful their action and threatened action, no matter how grievous the abuse of power by the petitioners, and no matter how great the resulting damage to respondents in the conduct of their businesses, relief may not be accorded by the courts in this suit, or in any other, for the reason, *inter alia*, that respondents do not have any right or privilege which the courts can protect against the threatened injury.[1]

The court below, in rejecting this contention (R. 397-400), followed the consistent course charted by the decisions of this and other courts.

A. Respondents have the right, apart from any statutory privilege, to bid and negotiate for Government contracts free from unprivileged and unlawful interference of Government officers acting in excess of their authority, and the decision of the court below that such right has been unlawfully invaded is correct.

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[1] If such contention were sustained, the courts would, of course, be powerless in the face of a "determination" that the prevailing minimum wages in the iron and steel industry are $10 an hour in a "locality" comprising the entire United States.

1. Apart from any statute, respondents have the right to be free from illegal interference in the legitimate conduct of their businesses, including the sale of their products to the Government.

The right asserted by respondents is the right to bid and negotiate for contracts with the United States, subject only to conditions imposed or authorized to be imposed by Congress and free from unlawful interference by third parties, including public officers acting outside the scope of their authority.

Such right is only one phase of the right of every person to conduct a legitimate business,—pursue a legitimate calling,—and in the conduct thereof to seek to sell the products or services of that business, free from unjustifiable interference, restraint or coercion by others. The law has sedulously protected that right for centuries.[2]

The Government has been a customer for many years of all respondents save one, and, at the date of institution of suit, was not only a party to contracts with several, but an important and active prospective customer of all.[3] Petitioners (who,

[2] *Tarleton* v. *McGawley*, Peake's M. P. 205, 170 Eng. Rep. 153 (K. B., 1793). A specific application of the general principle was stated by the American Law Institute in Section 766 of the Restatement of Torts (1939):

"Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

"(a) perform a contract with another, or

"(b) enter into or continue a business relation with another

is liable to the other for the harm caused hereby."

Section 698 states that one who alienates the affections of, or has sexual relations with, a person under contract to marry does not thereby become liable to the other party to the contract.

[3] See pages, *supra*.

like all public officers acting beyond their lawful authority, were acting as individuals [4] and, therefore, as third parties *vis-a-vis* respondents and the Government) threatened without justification to destroy respondents' right to bid for and negotiate contracts with that customer subject only to conditions imposed or authorized by it (i. e., by Congress, whose province it is to authorize or impose such conditions as it sees fit.[5])

Illustrative of the cases establishing that the courts will not hesitate to grant relief against acts of public officers outside the scope of their statutory authority which interefere with business relations with customers [6] is that of *Pierce* v. *Society*

[4] See cases collected pp., , *infra*.

[5] *Heim* v. *McCall*, 239 U. S. 175; *Ellis* v. *United States*, 206 U. S. 246; *Atkin* v. *Kansas*, 191 U. S. 207; and *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628, cited by petitioners (Br., p. 20), support only this proposition, which we do not, of course, dispute.

[6] The right to be free from unprivileged or unjustified interference with business relations is, of course, protected against others than public officers. See, e.g., *Emack* v. *Kane*, 34 Fed. 46 (Cir. Ct., N. D. Ill.); *Price-Hollister Co.* v. *Warford Corporation*, 18 Fed. (2d) 129 (D. C., N. D. Okla.); *American Mercury Co., Inc.*, v. *Chase*, 13 Fed. (2d) 224 (D. C., Mass.); *Graham* v. *Street Railroad Co.*, 47 La. Ann. 1656, 18 So. 707; *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332; *Loewe* v. *Lawlor*, 208 U. S. 274; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Co.* v. *Deering*, 254 U. S. 443; and *Truax* v. *Corrigan*, 257 U. S. 312. Such criticism as has been directed at the decisions in the five cases last cited (and similar decisions involving labor boycotts, etc.) has not been on the ground that the plaintiffs therein did not have any legal rights entitled to protection, but has been based on the theory that the conduct of the defendants therein was justifiable or privileged because of their self-interest. No such basis of privilege or justification is in issue in this case, since public officers sued for injunctive or declaratory relief may justify their action only by authority of law.

of Sisters, 268 U. S. 510. In that case, two private schools sought to enjoin the Governor and other officials of the State of Oregon from threatening or attempting to enforce the so-called Compulsory Education Act. That Act (which was to become effective more than a year after the case was decided by this Court) required every parent, guardian or other person having control or custody of a child between eight and sixteen years of age to send him to a public school for the period in each year during which a public school should be held in the district where the child resided, and failure to do so was made a misdemeanor. The plaintiffs contended that the statute in question was unconstitutional because it deprived the parents of their right to choose schools for their children and by reason of the unlawful interference with the free choice of schools by "patrons, present and prospective," of the plaintiffs, it deprived the plaintiffs of their property in their school business.

In affirming decrees granting preliminary injunctions against the enforcement of such statute, this Court said, in part (at pp. 534-536):

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compul-

sion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Truax* v. *Raich*, 239 U. S. 33; *Truax* v. *Corrigan*, 257 U. S. 312; *Terrace* v. *Thompson*, 263 U. S. 197.

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"Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in *possible* customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Appellees asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in *Truax* v. *Raich*, *Truax* v. *Corrigan* and *Terrace* v. *Thompson*, *supra*, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184; *Nebraska District* v. *McKelvie*, 262 U. S. 404; *Truax* v. *Corrigan*, *supra*, and cases there cited.

"The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective

date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

In *Truax* v. *Raich*, 239 U. S. 33, suit for an injunction was brought by an alien employee against a State Attorney General and a County Attorney to restrain them from enforcing criminal provisions of a statute against his employer. The statute made the employment of more than a certain percentage of aliens criminally punishable and in the particular case the defendant officers would have enforced the Act and so would have compelled the discharge of the plaintiff. The defendants contended, among other things, that the plaintiff was not entitled to sue for the relief asked, because (his employment not being for a term) he had no enforceable right to compel his employer to continue to employ him.

In holding that the statute was unconstitutional and that the employee had an interest sufficient to invoke equity jurisdiction to restrain enforcement thereof against the employer, this Court said (pp. 37-38):

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*In re Sawyer*, 124 U. S. 200, 210), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. [Citing cases.] *The right to earn a livelihood and to*

continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. *The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.* [Citing cases.] It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 162); that the servant cannot complain for the master, and that it is the master who is subject to prosecuton, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employes to bring the alien quota within the prescribed limit. * * * " [Italics ours.]

In *Pratt Food Co.* v. *Bird*, 148 Mich. 631, 112 N. W. 701, the plaintiff, a manufacturer of prepared foods for poultry and cattle, sought to enjoin the Dairy and Food Commissioner of Michigan from issuing to the trade a circular stating that the plaintiff's product was subject to the provisions of a Michigan statute which required

that any "concentrated commercial feeding stuff" should be labeled in a specified manner and accompanied by a chemical analysis of the product, and indicating that dealers purchasing and selling the plaintiff's product would be required to comply with such statute in respect thereof.

The Michigan Supreme Court affirmed the action of the lower court in dismissing the bill on the ground that the action of the Dairy and Food Commissioner was within his authority under the statute, after first holding that the court had jurisdiction of the action.

The Court said, in part (112 N. W. at 703):

> "* * * If the acts which are threatened are unlawful, *it cannot be doubted that placing in the hands of every dealer in the state a bulletin which in effect threatens them with prosecution* in case they make use of these products in the form in which they are lawfully sold to them, *would be to absolutely exclude complainant's business from the state.* The case presented is very similar in this aspect to that of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, * * *"[1] [Italics ours.]

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[1] To the same effect, see *State* v. *District Court*, 17 N. D. 285, 115 N. W. 675, in which case the Supreme Court of North Dakota vacated a temporary writ of prohibition which it had issued directing the District Court to quash an injunction issued by the latter enjoining the Commissioner and Chemist under the North Dakota Pure Food Law from issuing circulars or bulletins condemning the plaintiff's flour as adulterated and from seizing such flour and instituting criminal proceedings against the plaintiff; and *Crescent Mfg. Co.* v. *Mickle*, 216 Fed. 246 (D. C. Ore.), in which case

The foregoing cases and many others[8] make it abundantly clear that respondents have the right to bid and negotiate for contracts with the Government subject only to conditions imposed, or authorized to be imposed, by Congress, and free from the unlawful interference of third parties, including public officers acting outside the scope of their authority.

The rights of respondents in this case are even more plainly invaded by the unlawful interference of the petitioners than were the rights of the plaintiffs in most of the cases cited above. In such cases the action complained of, which constituted the unlawful interference, operated only indirectly on the plaintiffs by inducing or tending to induce their prospective customers not to deal with them.

The acts of petitioners in this case, however, affect the respondents not only indirectly by inducing their customer (i. e., the Government) not to deal with them except upon conditions not authorized by law, but also operate directly against the respondents by requiring that, if they wish to have their bids considered, they must include the unlawful conditions therein. In this aspect of the case, the respondents are placed upon what might

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the court enjoined the Dairy and Food Commissioner of Oregon from issuing a ruling barring the plaintiff's baking powder from that State.

[8] Among the cases which might be cited are *Terrace* v. *Thompson*, 263 U. S. 197; *Scully* v. *Bird*, 209 U. S. 481, cited with approval in *Tennessee Electric Power Co.* v. *T. V. A.*, 306 U. S. 118, 137-138; *State* v. *District Court*, 17 N. D. 285, 115 N. W. 675; *Crescent Mfg. Co.* v. *Mickle*, 216 Fed. 246 (D. C., Ore.); and *Roe* v. *Lundstrom*, 89 Utah 520, 57 Pac. (2d) 1128.

be termed a "conditional black list" in that they are prevented from submitting a meaningful bid unless it contains the unlawful conditions.[9]

The right asserted by respondents (the right to bid and negotiate for Government contracts free from conditions other than those imposed or authorized by Congress) is recognized, affirmed and made more valuable by Section 3709 of the Revised Statutes[10] which, with exceptions not here material, requires competitive bidding, after advertisement, on Government supply contracts, and the award of such contracts to the lowest responsible bidders.[11] That statute, which gives effect to the policy of Congress to encourage free and full competition for Government business, renders the right to be free from unprivileged interference much more valuable[12] than is the right to seek the patronage of private individuals free of such interference, since in the latter case the prospective

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[9] The acts of petitioners affect respondents precisely as they would be affected if they were placed upon the "black list" provided for in Section 3 of the Public Contracts Act. If respondents were placed on that list, they could (as petitioners state they may now) submit bids, with the certainty that they would not be considered. Would petitioners contend that one's rights would not be infringed if he were placed on such "black list" by action in excess of authority? *Cf. Burland Printing Co.* v. *La Guardia*, 9 N. Y. Supp. (2d) 616, wherein the act of a municipal contracting agency in disqualifying a prospective bidder from bidding for future public contracts was enjoined at the suit of such bidder.

[10] 41 U. S. C. § 5.

[11] See pp. 165-167, *infra*; Br., p. 35.

[12] As was pointed out by the Court below (R. 399).

customer may generally decline to deal because of mere whim or caprice.[13]

The Public Contracts Act, superimposed upon R. S., Section 3709, reiterates and makes more explicit the implications of the earlier statute. By that Act, Congress so preempted the field of wage provisions in Government supply contracts as clearly to prohibit Government officers from inserting in such contracts any wage provisions unauthorized by the Act, and the inclusion of any such other provisions is a direct violation of the statutory mandate.

Petitioners, indeed, have conceded (Pet., p. 11) that respondents have a legal right to do business with the Government upon such terms and conditions as *it* may prescribe and free from the "wrongful" or "otherwise unjustifiable" interference of third parties. It seems, moreover, that petitioners also concede (Br., 22-23) that their acts and threatened acts of which respondents complain have in fact interfered with the conduct by respondents of their businesses.

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[13] Petitioners argue (Br., p. 34) that the right to bid for Government contracts "is empty and protection of it futile" unless respondents can compel the award of contracts. Although we believe that that may be done in a proper case (see pp. 178-179, *infra*), we insist that the "mere" right to bid is valuable to respondents. This Court will certainly not presume that the contracting officers of the Government will not comply with the law once the courts have interpreted it. The Court in *Work* v. *Louisiana*, 269 U. S. 250 (see pp. 243-245, *infra*), pointed out that the plaintiff in that case could not compel the Secretary of the Interior to pass favorably upon its claim—yet it was not for an instant thought that the right to have that claim considered in the light of the applicable statutes as correctly interpreted by the Court was for that reason "empty" or protection of it "futile".

They contend, however, first, that they are not "third parties" as between respondents and the Government, and second, that, even if they are such third parties by reason of the fact that they have exceeded (and threaten to exceed) their statutory authority, their interference is nevertheless not wrongful or otherwise unjustifiable.

2. Petitioners, in acting and threatening to act in excess of their statutory authority, are third parties vis-a-vis respondents and the Government, and their interference is not privileged merely by reason of the fact that, if they had not exceeded their statutory authority, they would have been acting as agents of the Government.

Petitioners arrive at the conclusion that, even if they have exceeded their statutory authority, they are nevertheless not third parties as between respondents and the Government by first asserting that their status is the same as that of an agent of a private corporation who has exceeded the latter's instructions. Then, on the assumption that such an agent would not be liable, except to his principal, for his breach of duty, they assert that they similarly are not subject to injunction in this action.

Petitioners' argument essentially is not that they are not "third parties", but that their interference with respondents' businesses is privileged. Petitioners have not argued, nor could they, that they *are* the Government. It is obvious that they are in fact third parties and that the only issue is whether their interference is privileged by reason

of the fact that, if they had not exceeded their authority, they would have been acting as agents of the Government.

Whether the argument of petitioners be considered, however, as a plea of privilege, or as directed, as petitioners consider it to be, to showing that they are not third parties *vis-a-vis* respondents and the Government, petitioners derive no support from their supposed analogy.

A. In the first place, the analogy cannot properly be drawn. Either petitioners are agents of the Government, or they are not. The controlling factor in determining their status is the extent of their statutory jurisdiction and authority. If they act within it, they remain agents of the Government. If they exceed it by attempting to impose upon respondents in their dealings with the Government wage conditions not only not authorized, but forbidden, by Congress, they become private individuals and their acts, shorn of official justification, become the work of strangers to the Government.[15]

B. Even if the analogy were properly drawn (which, as above stated, it is not), it is by no means

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[15] See *Floyd Acceptances*, 7 Wall. 666; *Filor* v. *United States*, 9 Wall. 45; *Hawkins* v. *United States*, 96 U. S. 689; *Ferris* v. *United States*, 28 Ct. Cl. 332, 344-345; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; and other cases cited under Point X, *infra*. *Filor* v. *United States*, *supra*, was a suit upon a lease which had been executed by officers of the United States, without authority to bind it. This Court said (9 Wall. 45, 48): "The agreement or lease was, so far as the Government is concerned, the work of strangers. * * * The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so * * * they acted on their own responsibility."

clear that the agent of a private principal, who, in violation of his principal's instructions, either imposed conditions not desired by his principal or flatly refused to contract with one who desired to sell goods to his principal, would not be liable in tort to the prospective seller. The assumed immunity from liability rests upon the ancient doctrine of privity, which is constantly becoming more limited with the further development of the law.[16] The precise point in question seems to have been expressly left open by the American Law Institute in the Restatement of Agency,[17] and there are decided cases analogous to the one supposed which indicate that liability might be imposed.[18]

[16] In addition to the doctrine of privity, the old law of agency was affected by nebulous distinctions between nonfeasance and misfeasance, and it was generally believed that an agent who violated his duty to his principal was, so far as outsiders were concerned, guilty only of inaction. The modern and more sensible view disregards such distinctions, and the tendency is to say that an agent is guilty of more than mere inaction if his breach of duty consists of having undertaken to perform his duty and in the course thereof having actually invaded the interests of strangers to the agency.

[17] See Restatement of Agency (1933), *Caveat* to § 353 and the following illustration thereto:

"4. P, by mail, directs A, who is in charge of P's business, to sell goods to T at a certain price. Disliking T, A refuses to sell the goods to him and in P's absence T is unable to get the goods. The Restatement of this subject does not state whether or not A is liable to T."

[18] See *Sidney Blumenthal & Co.* v. *United States*, 30 Fed. (2d) 247 (C. C. A. 2d), *cert. den.* 279 U. S. 847; *McGurk* v. *Cronenwett*, 199 Mass. 457, 85 N. E. 576; *Carpenter* v. *Williams*, 41 Ga. App. 685, 154 S. E. 298; *Eastin & Knox* v. *T. & P. Ry. Co.*, 99 Texas 654, 92 S. W. 938; Explanatory Notes to §§ 574-580, Tentative Draft No. 6 (1931) of the Restatement of Agency; and Restatement of Torts (1939) § 766 and Illustrations thereto.

C. Whatever may be the responsibilities of a private agent in such a case, however, petitioners are in error in contending that for the same reason they cannot be enjoined in this suit from taking action in excess of their authority.

Their error lies in the assertion that public officers and private agents are subject to the same principles of law.[19] The fact is, of course, that the courts have always considered that public officers are ordinarily subject to entirely different rules than those applicable to private agents. As this Court has stated (*Hawkins* v. *United States*, 96 U. S. 689, 691):

> "Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents."

There are manifold illustrations of this fundamental distinction which petitioners ignore, the

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[19] For this proposition, petitioners cite *Dibble* v. *New Haven*, 56 Conn. 199, 14 Atl. 210, which is not in point. The court therein held that a taxpayer could not restrain an agent of a municipality from letting an unauthorized contract. The ground of decision, however, was that the taxpayer could not show any injury, since an unauthorized contract would not be binding on the municipality, and the remarks of the court quoted by petitioners (Appendix, p. 15) clearly meant only that the court would not enjoin a public agent, any more than it would a private agent, at the behest of one who was not threatened with any injury. The case, far from supporting petitioners' position, really aids respondents, since it seems clearly to imply that, if the plaintiff had shown any injury, the mere fact that the defendants were agents would not have been a defense. As petitioners say (*ibid.*), "the court's reasoning would apply equally to a bidder."

existence of which renders their analogy useless. A few examples will suffice:

(i) A public officer, all of whose acts must be justified by some statute, violates the law where his action, as in this case, is "in the teeth of the statute" and contrary to the statutory mandate (R. 397). A private agent who exceeds his authority does not thereby violate the law, but merely his principal's instructions.

(ii) When a public officer exceeds his authority, he becomes *vis-a-vis* the Government and others, as has been shown above, an individual stripped of his official character and his acts, accordingly, have no official justification and do not bind the Government. When a private agent violates the instructions of his principal, he may nevertheless retain his status as an agent acting within the scope of his apparent authority, and thus bind his principal.

(iii) A public officer may be compelled by mandamus in an appropriate case to perform a ministerial duty imposed upon him by statute, but similar relief would not lie against a private agent to compel performance of a duty imposed upon him by his principal.

Whether, therefore, the analogy relied on by petitioners be considered as supporting a plea of privilege or as directed at showing that petitioners are not "third parties", it is clear that the analogy does not aid them.

3. The court below properly held that the acts of the petitioners were neither privileged nor justified and that, therefore, they constituted wrongful interference with respondents' right to bid for and negotiate contracts with the Government.

Petitioners argue (Br., pp. 21, 26-32) that, conceding that they are third parties who have interfered with respondents in the conduct of their businesses, the interference does not subject them to injunctive or declaratory relief in this action because it is not "unlawful" or "unjustifiable". They base this contention on the premise that acts of third parties do not constitute unlawful or unjustifiable interference with business opportunities unless such acts, considered apart from the relationships with which they interfere, fall within the usual categories of common law torts.

As we have shown, petitioners' acts of interference affect the respondents not only indirectly by inducing their customer (i. e., the Government) not to deal with them except upon conditions not authorized by law, but also operate *directly* against the respondents by requiring that, if they wish to have their bids considered, they must include the unlawful conditions therein. Such acts directly regulate and control the respondents and invade and interfere with their right to conduct their business with the Government free of unlawful interference.

Petitioners are attempting to enforce the invalid Determination against respondents as directly as any public officer attempts to enforce any unauthorized ruling against a complainant in the more

usual type of case. And here, just as in such a case, the sole criterion in determinig whether or not the interference is "unlawful" or "unjustifiable" is not whether the requirements essential to a common law tort are present, but whether the interference is authorized by statute. If not, it will be restrained.[20]

Nor are petitioners, in asserting that the interference to be actionable must fall within the usual categories of common law torts,[21] in any better situation by supposing, as they do, that their acts in enforcing the Determination interfere with respondents' businesses only by tending to induce

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[20] In *Work* v. *Louisiana*, 269 U. S. 250 (pp. 243-245, *infra*), there was no suggestion made that the Secretary of the Interior had acted with malice, fraud, etc. He was enjoined because he was attempting to enforce an invalid ruling in the only way in which enforcement thereof was possible, i.e., by telling the State of Louisiana that its claim would not be considered if it refused to act in accordance with such ruling. The close analogy between that case and the instant one is apparent.

[21] Petitioners rely on the phrase "[right] protected against tortious invasion" used by this Court in *Tennessee Electric Power Co.* v. *T. V. A.*, 306 U. S. 118, 137-8, and imply that the word "tortious" as used therein refers to an act which is tortious at common law in a two party situation. It seems clear, however, that the Court in the phrase quoted was using "tortious" in the broad sense of "unlawful", i.e., as designating an act against which the law protects one. For example, in *Lumley* v. *Gye*, 2 Ell. and Bl. 216, the act of the defendant was not "tortious" in the sense in which the petitioners use that term, but was so in the sense in which it seems this Court used the term in the phrase quoted above. It has been said that the significance of *Lumley* v. *Gye* is in its extension of liability to methods of inducement of breach of contract or refusal to deal which are "non-tortious" as between the defendant and the person induced. See Restatement of Torts (1939), Comment *b* to § 766.

the respondents' customer (i. e., the Government) not to deal with them.

By so asserting, petitioners attempt to confuse the issue by making it seem that the essence of the tort is the injury done to the interests of the person induced. It is perfectly clear, however, that a prospective seller who sues to enjoin interference which tends to induce his prospective customer not to deal with him is not suing to prevent an injury to such customer, but is complaining of an injury to his (the seller's) interest. The essence of the tort is interference, and the manner in which the interference is achieved is important only in so far as it affects the question of privilege.

A clear statement of the correct principles was made by the American Law Institute in the Restatement of Torts (1939): [22]

> "There is no technical requirement as to the kind of conduct that may result in inducement. It may be any conduct which conveys to the third person the actor's desire to influence him not to deal with the other. Thus, it may be a simple request or persuasion which exerts only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the re-

[22] § 766, Comment *f*. Comment *d* states the same principle: "* * * The rule stated in this Section applies to any purposeful causation whether by inducement or otherwise. The essential thing is the purpose to cause the result." See also, Explanatory Notes to § 9, Proposed Final Draft No. 6 (1939), Restatement of Torts: "*Prima facie*, a defendant is liable for interference with plaintiff's expectancy of custom even when his interference is merely by persuasion. In the case of a competitor, persuasion is, of course, always privileged. A non-competitor does not fare so well."

quest were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person, or to persons in whose welfare he is interested. * * * "

In an attempt to support their position, petitioners quote (Br., p. 27) from *Union Car Advertising Co., Inc.* v. *Collier*, 263 N. Y. 386, 401, 189 N. E. 403, 409, what they state is "the broadest formulation of liability" in this field. In that case the plaintiff and the defendant were competitors,[23] and the statements of Judge Cardozo quoted by petitioners must be read in the light of that fact.[24] The common law has always sought to foster the conduct of legitimate business, and the courts, because of the social interests involved in fostering competitive enterprise, have held privileged, when done by a competitor in the legitimate defense or promotion of his business, acts which are unprivileged when done by a non-competitor.[25] It is essen-

[23] So also in *Goldman* v. *Hartford Road Building Assn.*, 150 Md. 677, 133 Atl. 843, also relied on by petitioners (Br., p. 28).

[24] Petitioners suggest (Br., p. 28) that in order to enable a prospective seller to enjoin unprivileged interference he must point with some "certainty" to specific contracts which he would receive but for such interference. That suggestion is unsupported by authority. The degree of probability or certainty would be relevant in a suit against an alleged interferor for damages (as was the case of *Union Car Advertising Co., Inc.* v. *Collier;* see *Lewis* v. *Bloedel*, 202 Fed. 7 (C. A. A. 4th), wherein the plaintiff lost a Government contract because a competitor bribed an official) but in a suit for an injunction to prevent injury all that need be shown is that the acts sought to be enjoined will influence or tend to influence the decisions of prospective purchasers.

[25] " * * * Again, A may be privileged to induce B not to deal with C, A's competitor, and be unprivileged to induce him in the same way not to deal with D who is not a competitor." Comment *d* to § 767, Restatement of Torts (1939).

tial to the maintenance of a competitive system that competitors be allowed to attempt to divert trade from each other to themselves, the only limitation being that the attempted diversion must not be by means considered violative of the current legal concepts of "fair competition".[26]

When we depart from the competitive field, however, the concepts in the light of which justification or privilege is determined change. Thus, if a defendant is not a competitor of the plaintiff, his interference may be held unprivileged and he may be enjoined, even though he acts in perfect good faith.[27]

For example, in *American Mercury Company, Inc.*, v. *Chase*, 13 Fed. (2d) 224 (D. C., Mass.), the defendant, Secretary of the Watch and Ward Society, had notified distributors of books and magazines that such Society believed that an issue

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[26] The permissible scope of even a competitor's acts has been and is being increasingly narrowed by the development of new concepts of "unfair competition".

[27] Petitioners state (Br., pp. 30-31) that respondents concede that threats of prosecution or litigation made with the purpose of intimidating a plaintiff's customers are not tortious if done in good faith. The statement made by respondents in their brief in the court below to which petitioners refer was, however, not so unqualified. What respondents said was that such threats were justifiable if made by *competitors* in good faith in the legitimate defense of their business interests and property. See pp. 118-119 of Brief for Appellants in the Court of Appeals. Moreover, petitioners cite (Br., p. 30) *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332, and imply that such statement of respondents applied to that case. That case, however, did not involve competitors, and was treated by respondents in their brief in the Court of Appeals (see pp. 119-120 thereof) as a case of a different type than that with regard to which such statement was made.

of the American Mercury violated the law and that distributors would be prosecuted if they sold such issue. The court denied the defendant's motion to dismiss the complaint and granted the plaintiff's motion for a preliminary injunction.[28]

When the defendant is not only a non-competitor of the plaintiff, but is also a public officer charged with exceeding his authority, no question of good faith is even relevant in a suit for an injunction or for declaratory relief.[29]

In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (discussed at pp. 141-144, *supra*), *Truax* v. *Raich*, 239 U. S. 33 (discussed at pp. 144-145, *supra*), and *Terrace* v. *Thompson*, 263 U. S. 197, this Court did not inquire, nor have other courts in similar cases inquired, whether the public officers who were defendants acted "in good faith" in believing that the statutes on which they relied were constitutional or authorized their proposed acts. The issue was simply whether the contemplated action was authorized by law; if not, the defendant was enjoined, provided the other requisites for equitable relief were present.

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[28] In *Graham* v. *St. Charles Street Railway Co.*, 47 La. Ann. 1656, 18 So. 707, the defendant, a foreman of a street railway company, dissuaded employees of such company from trading at the plaintiff's grocery store. He was held liable in damages, his interference not being considered privileged even though apparently motivated by the fact that a tenant of his also ran a grocery store. See also *Morasse* v. *Brochu*, 151 Mass. 567, 25 N. E. 75.

[29] The reason is plain. The acts of public officers "must be justified by some law" (*American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108) and a defendant "sued as a wrong-doer, who attempts * * * to justify by the authority of the State, * * * [must] produce a law of the State which constitutes * * * a warrant for his act" (*Poindexter* v. *Greenhow*, 114 U. S. 270, 288).

Petitioners' attempt to distinguish such cases by saying (Br., p. 31) that they involved coercion by means of threats to institute criminal prosecutions under unconstitutional statutes or prosecutions for which the statutes provided no bases is fallacious. The essence of the tort in such cases was the interference with the plaintiffs' relations with prospective customers which would result from acts of public officers in excess of their authority—the precise tort of which respondents herein complain.

Alabama Power Co. v. *Ickes*, 302 U. S. 464, and *Tennessee Electric Power Co.* v. *T. V. A.*, 306 U. S. 118, do not hold, as petitioners claim, that coercion, fraud, bad faith, malice, conspiracy or intimidation are essential elements in unjustified or unprivileged interference with business relations. They merely hold that one has no right to be immune from lawful competition,[30] even though such competition may have been made possible by Governmental action which is without either constitutional or statutory warrant.

Respondents do not assert, as intimated by petitioners (Br., p. 29), that respondents have any legal right, as such, to maintain an existing competitive position. Respondents maintain that their legal right to bid and negotiate for Government contracts, subject only to conditions imposed, or authorized to be imposed, by Congress, and free from the unlawful interference of third parties, including public officers acting outside the scope of their authority, has been unlawfully invaded, and

[30] Some language in *Louisiana* v. *McAdoo*, 234 U. S. 627, also cited by petitioners (Br., p. 29), indicates that it is to be explained on the same basis.

is threatened with further unlawful invasion, and they show that they will be driven out of competition for Government business only for the purpose of demonstrating the substantial and irreparable character of the damage which will be inflicted unless such unlawful invasion is arrested. It is, of course, well settled that if one's competitive position is impaired by unlawful invasion of a right, including unjustifiable interference with business relations, one may enjoin such invasion or interference.

Petitioners do not, therefore, advance their argument by citing (Br., p. 29) those two cases or *Edward Hines Trustees* v. *United States*, 263 U. S. 143, and *Sprunt & Son* v. *United States*, 281 U. S. 249, which hold that action by an administrative body not shown to invade any right of the complainant may not be enjoined.[31]

Petitioners further contend (Br., p. 28) that even if the erroneous construction of a statute by a public officer is arbitrary, capricious and malicious, "no tortious liability is thereby created at common law".[32] Admittedly, high public officers cannot be sued for damages for injuries caused by acts of theirs having any proper connection with or rela-

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[31] Compare the *Chicago Junction Case*, 264 U. S. 258, where the action by the administrative body did invade rights of the complainant and also resulted in an impairment of its competitive position. Such action was enjoined.

[32] Petitioners are correct in saying (Br., p. 28) that the mistaken construction of a statute is not "a tort in and of itself". Respondents, however, assert no such proposition of a tort *in vacuo* but complain of acts and threatened acts, taken in excess of authority by reason of a misconstruction of a statute, which invade their legal rights.

tion to their official duties.[33] The reason, of course, is one of public policy—officers might fear to take any action if in so doing they were to run the risk of subjecting their personal estates to liability.

That reason, obviously, is not applicable in a suit for injunction. The distinction is fundamental. In the very case cited by petitioners which held that the Secretary of the Treasury was not liable in damages for injury resulting from his erroneous construction of a tax law,[34] reference is made to a decision of this Court enjoining subordinates of the same Secretary from enforcing the same erroneous construction.[35]

From the foregoing discussion, it is apparent that, apart from any statutory right or privilege, respondents have the right to bid and negotiate for Government contracts subject only to conditions imposed, or authorized to be imposed, by Congress, and free from unlawful interference; that such right has been unlawfully invaded by the unprivileged and unjustified acts of petitioners taken in excess of their statutory authority and jurisdiction; and that, therefore, the decision of the court below that respondents have a standing to sue to enforce such right is manifestly correct.

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[33] *Standard Nut Margarine Co.* v. *Mellon*, 72 Fed. (2d) 557, *cert. den.* 293 U. S. 605; *Cooper* v. *O'Connor*, 105 Fed. (2d) 761; *Fletcher* v. *Wheat*, 100 Fed. (2d) 432, *cert. den.* 307 U. S. 621; *Lang* v. *Wood*, 92 Fed. (2d) 211.

[34] *Standard Nut Margarine Co.* v. *Mellon*, 72 Fed. (2d) 557, *cert. den.* 293 U. S. 557.

[35] *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498.

B. Section 3709, R. S. and the Public Contracts Act not only recognize and affirm the right of respondents to bid and negotiate for Government contracts free from the imposition of conditions not authorized by Congress, but also grant to respondents a statutory right or privilege similar in character which they may properly assert in this action.

The right to bid and negotiate for Government contracts subject only to conditions authorized by Congress and free from unlawful interference by third parties, including Government officers acting outside the scope of their authority, is recognized and affirmed by Section 3709, R. S., and the Public Contracts Act. As we shall show, those statutes are based upon the existence of that right and can achieve their full purpose only if it be *enforced*.

Those statutes, however, go further and actually confer on prospective bidders for Government contracts a statutory right or privilege to bid thereon free from conditions not authorized by such statutes which can be protected in the courts against invasion by Government officers acting in violation of such statutes.

1. Section 3709, R. S., and the Public Contracts Act are part of a statutory scheme which requires that Government supply contracts be awarded, after competitive bidding, to the lowest responsible bidders and which makes it unlawful for a Govment officer to require that there be included in such contracts any provisions, other than those authorized by such statutes, relating to the wages to be paid to employees of Government contractors.

It is the purpose of the various Federal statutes relating to public contracts to insure full and free competition therefor and the award of such contracts after competitive bidding to the lowest responsible bidder.

Although Section 3709, R. S.,[36] does not in terms provide for competitive bidding, it has been consistently interpreted by the courts and the executive departments (as pointed out by petitioners, Br., p. 35) as requiring, with exceptions not here material,[37] competitive bidding, after advertis-

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[36] Set forth at pp. 65-66, *supra*.

[37] § 3709 does not require competitive bidding when immediate delivery or performance is required by the public exigency or when competition is not possible, as in the case of a patented or copyrighted article. Again, practically all Government purchasing officers are permitted by statute to purchase supplies in nominal amounts (generally $50 or $100) without competitive bidding. See 41 U. S. C. § 6. Certain other types of contracts have from time to time been excepted from the operation of § 3709. See, e.g., 10 U. S. C. § 1203 and 34 U. S. C. § 569 (medicinal supplies for the Army and Navy.)

ing,[38] on Government supply contracts, and the award of such contracts to the lowest responsible bidders.[39]

Other Federal statutes, relating to public contracts of specific types and passed in furtherance of the policy of insuring full and free competition, make explicit the requirements of Section 3709, R. S., as interpreted, by specifically providing that such contracts be awarded after competitive bidding to the lowest responsible bidders.[40]

Accordingly, as pointed out in an earlier section of this brief (Point III, A, 1), it has long been settled that, unless specifically empowered so to do by another statute, Federal officials may not impose upon bidders for Government contracts conditions or qualifications requiring conformity to the social, economic or political policies advocated by such officers, but not necessary to protect the United States in connection with the performance of the contracts.[41] The imposition of such conditions or qualifications would manifestly tend to

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[38] The "advertising" may be done in any one or more of several ways: by sending copies of specifications and invitations to bid to a regular list of bidders who usually compete on contracts for the supplies in question; by posting notices in public places, such as postoffice bulletin boards; or by paid advertisements in newspapers.

[39] See *Schneider* v. *United States*, 19 Ct. Cl. 547; *Scott* v. *United States*, 44 Ct. Cl. 524; 19 Op. Atty. Gen. 685; 28 Op. Atty. Gen. 384; 38 Op. Atty. Gen. 555, 557.

[40] See, e.g., 34 U. S. C. § 561, 573 and 575 (Navy contracts for current and foreign supplies and provisions) and 10 U. S. C. § 1200 (supplies for Army Quartermaster Corps).

[41] See Senate Report No. 1157, 74th Cong., 1st Sess., quoted from at p. 67, *supra*; 19 Op. Atty. Gen. 685. See also the decisions of the Comptroller General cited in the next note.

narrow competition and raise the prices required to be paid by the Government for articles or services purchased.

Thus, as also pointed out, in the absence of express statutory authority, an executive department may not lawfully include in invitations for bids on contracts for Government work stipulations requiring the contractor to pay any specified wage rates to employees employed in the performance of the contract.[42]

In this state of the law, Congress passed the Public Contracts Act for the express purpose, *inter alia*, of authorizing contracting officers to insert in Government supply contracts wage provisions which, in the absence of such legislation, could not have been imposed. It must of necessity follow that such officers may not now include in such contracts wage provisions not authorized by that Act.

That conclusion would follow, even if the Act were considered alone, since Congress, by occupying the field of wage provisions in Government contracts and specifying the provision which may be inserted, has by necessary implication excluded the insertion of other or different provisions. When, however, the Act is considered in the framework of Section 3709, R. S. and the accepted interpretation thereof, the conclusion is inescapable.

Indeed, we do not understand that petitioners contend to the contrary.

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[42] 10 Comp. Gen. Dec. 294; 19 Comp. Gen. Dec. 673; see also Senate Report cited in last preceding note.

2. Section 3709, R. S., and the Public Contracts Act confer on respondents an enforceable right or privilege to bid and negotiate for Government contracts free from wage conditions imposed in violation of those statutes.

Petitioners assert that neither Section 3709, R. S., nor the Public Contracts Act confers on respondents a right or privilege which can be enforced in this action to bid and negotiate for Government contracts free from wage conditions imposed in violation of those statutes.

(a) The broad underlying purpose of Section 3709 R. S., and the Public Contracts Act cannot be achieved unless all persons complying with the conditions imposed or authorized to be imposed by Congress have the right or privilege to bid on Government contracts, free of other conditions unlawfully imposed.

As we have said, the broad underlying purpose of the Federal competitive bidding statutes is to insure full and free competition for Government contracts so as to enable the Government to secure its supplies at the lowest price. Even if, as petitioners contend, such statutes were passed chiefly for the benefit of the Government and their object is the protection to the Government that will result from such competition, it is nevertheless equally true that such benefit and protection cannot be achieved, and the entire statutory scheme is futile, unless all persons complying with the conditions imposed or authorized to be imposed by Congress have the right to bid on Government contracts, free of other conditions unlawfully imposed, and the

right to have their bids considered in accordance with the applicable statutes.

When the Public Contracts Act is considered in the light of the background afforded by the previous competitive bidding statutes, it seems evident that Congress intended that all persons who would agree to the wage conditions prescribed by it in the Act should have the right to bid for Government contracts free from the imposition of wage conditions not authorized by the Act.

Furthermore, as has been shown above (pp. 94-95, 101-102, *supra*), the legislative history of the Public Contracts Act shows plainly that Congress intended to confer benefits upon those bidders for Government contracts who would agree to comply with its provisions. It is thus apparent that, even considered independently of the competitive bidding statutes, Congress intended by the Public Contracts Act to confer upon all persons who would agree to the wage conditions prescribed in the Act the right to bid for Government contracts free from wage conditions imposed in violation of the Act.[43]

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[43] This intent to confer benefits upon bidders for Government contracts is not, it seems, peculiar to the Public Contracts Act. In recent years, as Government purchases have become an increasingly significant factor in the nation's economic life, there seems to have been present in other statutes as well an intent to require competitive bidding not only to protect the Government purse but, apart from that, to prevent favoritism. See, e.g., H. Rept. 2060, 73rd Cong., 2d Sess., wherein the House Committee on Military Affairs stated that certain procurement practices of the War Department had "resulted in favoritism and discrimination, which section 3709 of the Revised Statutes and section 10 (t) of the Air Corps Act [Act of July 2, 1926, c. 721, 44 Stat. 780, 788] sought to eradicate by prescribing competitive bidding in the Army Air Corps."

Respondents' position is fully supported by the decisions of this Court which have held that a statute by imposing restrictions on the exercise of a privilege has implicitly recognized and affirmed the right of the person seeking to exercise such privilege to do so free of any other restrictions sought to be imposed by officers acting without authority.

Thus, in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, it was held that since Congress had specifically defined the conditions upon which the Postmaster General might deprive the plaintiff of the use of the postal facilities the plaintiff was entitled to relief to prevent the Post Office Department from depriving it of the use of such facilities in circumstances not authorized by the statute. The Court said, in part (187 U. S. at 110):

> "In our view of these statutes, the complainants had the legal right, under the general acts of Congress relating to the mails, to have their letters delivered at the post office as directed. *They had violated no law which Congress had passed* * * *. They allege, and it is not difficult to see that the allegation is true, that, if such action (of the defendant) be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured, if not wholly destroyed, such business being, so far as the laws of Congress are concerned, legitimate and lawful. * * *" [Italics ours.]

So in *Waite* v. *Macy*, 246 U. S. 606, it was held that since Congress had defined the conditions un-

der which tea might be excluded from the United States the plaintiff was entitled to relief against a regulation of the Secretary of the Treasury whereby the plaintiff's tea would have been excluded in circumstances not authorized by the statute.

In neither of the two cases last referred to did the statutes purport to confer upon the plaintiff, or upon any class of persons of which the plaintiff was one, any particular right or privilege. The significant point is that in each case the statute defined the conditions on which Government officials might prohibit the plaintiff from freely exercising the right or privilege which he sought to exercise and that the Court held that he was entitled to relief against the attempt of such officials to prevent him from exercising such right or privilege in a case in which the statute did not authorize such officials so to do.

So in *Gegiow* v. *Uhl*, 239 U. S. 3, it was held that since Congress had defined the conditions under which immigrants might be excluded from the United States by the Commissioner of Immigration the plaintiffs were entitled to relief against an order of the Commissioner which would have excluded them from the United States in circumstances in which the Commissioner was not authorized by Congress so to do. This Court in that case succinctly expressed the underlying principle of this class of cases as follows (239 U. S. at 9): "The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases." [44]

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[44] To the same effect see *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56; *Perkins* v. *Elg*, 307 U. S. 325.

Application of that principle to the facts of this case leads inevitably to the conclusion that respondents have a standing sufficient to entitle them to relief against action by petitioners which will deprive respondents of their right to bid on public supply contracts free from any wage provisions not imposed or authorized by Congress.

Petitioners contend that the decisions of the Federal and State courts establish that Section 3709, R. S., and the Public Contracts Act do not confer the right which we assert. The question, however, is at least an open one in this Court and although the cases in other courts are in conflict, it would appear that the weight of authority, as well as principle, supports the respondents' position.

Section 3709, R. S., has been before this Court in only two cases, neither of which involved the question in issue here, but the opinions in which contain dicta which are indicative of the view of this Court.

United States v. *Purcell Envelope Co.*, 249 U. S. 313, the earlier of the two cases, involved an appeal from a judgment of the Court of Claims awarding damages for breach of contract by the United States. After the plaintiff's bid had been accepted, but before a formal contract was signed, a successor Postmaster General canceled the award. In holding that a contract had come into existence when the plaintiff's bid was accepted and he was notified that the contract had been awarded to him, and that the successor Postmaster General had no discretion to cancel the contract, the Court said (249 U. S. at 318):

> "There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (§ 3709, Rev. Stats.). *By it the Government is given the benefit of the competition of the market and each bidder is given a chance for a bargain.* It is a provision, therefore, in the interest of both Government and bidder, *necessarily giving rights to both* and placing obligations on both. And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own." [Italics ours.]

Although the language above quoted was not necessary to the decision, it is significant in that it shows that this Court recognized that Section 3709, even considered apart from any other statute, gives bidders a chance for a bargain and gives them that chance in order that the Government may get the benefit of full competition.

And if, as the Court stated, Section 3709, R. S., confers upon bidders the right to bid, certainly it can be asserted with equal or greater propriety that Section 3709 and the Public Contracts Act, which was enacted by Congress for the purpose of encouraging bidders, confer upon them the right to bid free of conditions imposed in violation of those statutes.

Petitioners attempt to dismiss the statements quoted above by arguing (Br., p. 36) that they mean only that after a contract is awarded the bidder becomes a contractor and can sue in the Court of Claims. But Section 3709 is not necessary

for that result. That section does not authorize the making of any contract, but merely requires competitive bidding and the award of public contracts to the lowest responsible bidder.

The second of the two cases to which we have referred is *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, which was also an appeal from the Court of Claims. The plaintiff, which had supplied materials to the United States, claimed that it was entitled to recover the price fixed for payment of materials supplied under wartime requisition orders, whereas the United States claimed that such materials had been supplied under a contract which provided for a lesser price. The plaintiffs maintained that the contract was invalid, because it had not been made after advertising and there had not been any public exigency requiring immediate delivery so as to avoid the necessity of advertising. Mr. Justice Holmes, writing for the Court, summarily disposed of that contention (259 U. S. at 78):

> "We may lay the latter objection on one side. There can be no question that the war created a public exigency and it would be going far to deny that the contract was for a delivery as immediate as was practicable for the subject matter. Moreover, the statutory requirements were for the protection of the United States, not of the *seller*. *United States* v. *New York & Porto Rico Steamship Co.*, 239 U. S. 88, 36 Sup. Ct. 41, 60 L. Ed. 161." [45] [Italics ours.]

[45] The case cited by the court held that a contractor could not defend a suit for breach of contract on the ground that the contract was not in writing and signed by both parties as provided in R. S., § 3744.

The statement by Mr. Justice Holmes that the requirements for advertising are "for the protection of the United States, not of the seller" was a dictum, but it seems to have been a considered one. It was clearly a correct statement when considered in the light of the case before the Court, since one who obtains a contract without competitive bidding should certainly not be heard to complain of the omission. It is one thing, however, to say that the requirements for competitive bidding are not for the protection of a "seller" and a different thing entirely to say that they are not for the protection of a prospective bidder. We do not believe that Mr. Justice Holmes, who had concurred three years before in the opinion in the *Purcell* case, intended to say, or thought that he was saying, the latter thing.[46]

Petitioners cite (Br., p. 37) four cases in lower Federal courts[47] as authority for the statement that upon the few occasions when Section 3709,

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[46] The *New York & Porto Rico* case cited by Mr. Justice Holmes bears this out. That case held (see preceding note) that one who had made, by correspondence, an informal agreement with the Government could not, having breached the agreement for one reason, defend a suit for damages on the ground that a statute required the contract to be in writing and signed by both parties. This Court (in an opinion by Mr. Justice Holmes) held that such statute was a statute of frauds for the benefit of the United States. It seems clear, however, that a bidder would not be in the same position as a seller, i. e., it seems that a bidder would be entitled to refuse to enter upon performance of a contract which the contracting officer refused to put into writing and sign as required by a statute.

[47] *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. C., Mass.); *B. F. Cummins Co.* v. *Burleson*, 40 App. D. C., 500; *Champion C. P. Co.* v. *Joint Comm. on Printing*, 47 App. D. C. 141; *cf. Strong* v. *United States*, 6 Ct. Cl. 135.

R. S. (or any similar Federal statute), has been before the courts, it has been uniformly held or stated that it gives no standing to bidders to attack the award of contracts. Relying on those cases, petitioners contend that Section 3709 and the Public Contracts Act do not confer the right which respondents assert, or any other right.

One of such cases [48] was an attempt by a bidder to mandamus the award of a contract after the contracting officer had, in the exercise of the discretion given him by the applicable statute, rejected *all* bids.

Another of such cases [49] held that an unsuccessful bidder for contracts to be awarded on the basis of "cheapness and efficiency" (and who apparently was not the lowest responsible bidder) could not enjoin the execution of contracts which had been awarded to other bidders. The Court first decided the case on the merits, and then held that the plaintiff (who sued solely in the capacity of a Federal taxpayer having no special interest) had no standing to maintain the action.

Another of such cases [50] held that one who submitted a bid on a contract did not acquire a contract merely because he was the lowest bidder. The contracting officer, after receiving bids, did not award the contract to any one and the plaintiff attempted to sustain the obviously unsound proposition that a failure to reject his bid constituted an acceptance thereof so as to form a contract.

In the fourth of such cases [51] the Massachusetts

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[48] *Champion C. P. Co.* v. *Joint Comm. on Printing*, 47 App. D. C. 141.

[49] *B. F. Cummins Co.* v. *Burleson*, 40 App. D. C. 500.

[50] *Strong* v. *United States*, 6 Ct. Cl. 135.

[51] *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. C. Mass.)

District Court refused to enjoin the performance of a contract theretofore awarded, and to mandamus its re-award, at the instance of a low bidder who claimed that he was responsible.

It is clear that the first three of the above-mentioned cases relied on by petitioners have nothing whatever to do with this case. The fourth case, at least, involved one of the two statutes on which respondents rely, but it is evident that it is not authority for the proposition that the lowest responsible bidder cannot compel the award of a contract to himself, in a case not involving the exercise of discretion by a contracting officer as to a bidder's responsibility,[52] or as to the advisability of rejecting all bids, or otherwise.

(b) The weight of authority of the decisions under state and local competitive bidding statutes supports respondents' contention.

Petitioners, however, do not rely solely upon the decisions of the Federal courts under Section 3709, R. S., to establish that neither that Act nor the Public Contracts Act gives bidders any right to compel the award of contracts. They also contend that "the great majority of the decisions" under state and local competitive bidding statutes are to that effect.

Petitioners themselves recognize (Br., p. 39) that a number of such decisions are irrelevant, because the suits in which they were rendered were

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[52] "The necessity of selecting a responsible bidder imports into the ministerial act an element of discretion to determine whether the lowest bidder is qualified to carry out his contract . . . the 'term responsible means something more than pecuniary ability; it includes also judgment, skill, ability, capacity and integrity.'". *O'Brien* v. *Carney*, 6 F. Supp. 761, 762.

merely attempts by disappointed bidders to have the courts reverse decisions made by contracting officers in the exercise of their judgment and discretion as to which bids should be accepted. The remainder of such decisions, moreover, are not to the effect cited by petitioners.

The courts in seven jurisdictions have expressly held that the lowest responsible bidder may by mandamus compel the award of a contract,[53] and in four other States the courts have considered such cases on the merits without discussion of the jurisdictional question.[54] In only seven States,

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[53] *Bransfield Co.* v. *Kingery*, 283 Ill. App. 405; *State* v. *Louisiana State Board of Agric. & Imm.*, 122 La. 677, 48 So. 148; *State* v. *Corwin*, 52 Neb. 25, 71 N. W. 961; *State* v. *Board of Control*, 122 Neb. 897, 240 N. W. 557; *Araneo-White Constr. Co.* v. *Joint Mun. Sewer Comm.*, 9 N. J. Misc. 243, 154 Atl. 313; *State* v. *Building Comm.*, 125 Ohio 301, 181 N. E. 129; *Baldwin* v. *Colegrove*, 45 Dauph. (Pa.) 430; *Marshall Co.* v. *Bigelow*, 29 Haw. 48. *Commonwealth* v. *Mitchell*, 82 Pa. St. 343, the 1876 Pennsylvania Supreme Court case cited by petitioners (Appendix, p. 12) is contrary to *Baldwin* v. *Colegrove*, the 1938 Dauphin County case cited *supra* in this note; the opinion in the later case, however, is so well reasoned and the court of such importance (it has State wide jurisdiction of actions against State officials) that it seems to counsel for respondents to represent the present law in Pennsylvania.

[54] *Stanley-Taylor Co.* v. *Supervisors of San Francisco*, 135 Cal. 486, 67 Pac. 783; *Neal Publishing Co.* v. *Rolph*, 169 Cal. 190, 198, 146 Pac. 659; *Dixon-Paul Printing Co.* v. *Board of Public Contracts*, 117 Miss. 83, 77 So. 908; *Tribune Co.* v. *Barnes*, 7 N. D. 591, 75 N. W. 904; *Free Press Assn.* v. *Nichols, et al.*, 45 Vt. 7, wherein the court said, as petitioners state (Appendix, p. 19), that the principal object of the law was to benefit the State, but also said that one of its purposes was "to protect those who might bid for the work against favoritism of those whose duty it would be to award the contracts * * *."

however, is it held that such a bidder has no standing to mandamus the award.[55]

In four States[56] such a bidder may enjoin the award of a contract to another bidder,[57] while in four other States actions for such relief have been considered on the merits.[58] In only four States[59]

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[55] *Hanlin* v. *The Ind. District, Etc.*, 66 Ia. 69, 23 N. W. 268; *Bancamerica-Blair Corp.* v. *State Highway Comm.*, 265 Ky. 100, 95 S. W. (2d) 1068; *State ex rel. Johnson* v. *Sevier*, 339 Mo. 483, 98 S. W. (2d) 677; *State ex rel. Stuewe* v. *Hindson*, 44 Mont. 429, 120 Pac. 485, but *cf. State ex rel. Publishing Co.* v. *Smith*, 21 Mont. 46, 52 Pac. 641; *People ex rel. Belden* v. *The Contracting Board*, 27 N. Y. 378; *Matter of Gavaert Co.* v. *Greeff*, 262 N. Y. 651, 188 N. E. 106 (with which *cf., Molloy* v. *City of New Rochelle*, 198 N. Y. 402, 92 N. E. 94); *Times Publishing Co.* v. *Everett*, 9 Wash. 518, 37 Pac. 695; *Bellingham American Publishing Co.* v. *Bellingham Publishing Co.*, 145 Wash. 25, 285 Pac. 836; *Butler* v. *Printing Comm'rs.*, 68 W. Va. 493, 70 S. E. 119.

[56] *Callaghan & Co.* v. *Smith*, 304 Ill. 532, 136 N. E. 748; *St. Landry Lumber Co.* v. *Town of Bunkie*, 155 La. 892, 99 So. 687; *Burland Printing Co.* v. *La Guardia*, 9 N. Y. Supp. (2d) 616; *Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384; *Berry* v. *Tacoma*, 12 Wash. 3, 40 Pac. 414; *Bellingham American Publishing Co.* v. *Bellingham Publishing Co.*, 145 Wash. 25, 258 Pac. 836.

[57] It should be noted that in two of these jurisdictions (New York and Washington) mandamus is refused.

[58] *Mitchell* v. *Walden Motor Co.*, 235 Ala. 34, 177 So. 151; *Hirsch* v. *Mayor and Aldermen of Vicksburg*, 141 Miss. 827, 105 So. 492; *Leininger* v. *Ward*, 126 Okla. 114, 258 Pac. 863; *Higgins* v. *Green*, 56 R. I. 330, 185 Atl. 686.

[59] *Arkansas Democratic Co.* v. *Press Printing Co.*, 57 Ark. 322, 21 S. W. 586; *Peeples v. Byrd*, 98 Ga. 688, 25 S. E. 677; *Kelly, Piet Co.* v. *Mayor and City Council of Baltimore*, 53 Md. 134; *Washburn Lignite Coal Co.* v. *Murphy, et al.*, 54 N. D. 113, 208 N. W. 837.

is it definitely held that the lowest bidder may not maintain an action to enjoin the award.[60]

A most significant feature of the State decisions is that in only one jurisdiction (Missouri)[61] have the courts held without consideration of the merits that a competitive bidding statute confers no rights of any kind upon bidders or prospective bidders. In the other cases in which either mandamus or injunction (to prevent award to another)[62] has been denied the courts have in fact

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[60] In New Jersey unsuccessful bidders may secure review by certiorari proceedings (*Tufano* v. *Borough of Cliffside Park*, 110 N. J. L. 370, 165 Atl. 628; *Paterson Contracting Co.* v. *Hackensack*, 99 N. J. L. 260, 122 Atl. 741). In Colorado prospective bidders, and employees of prospective bidders, have been permitted, without discussion of standing to sue, to maintain declaratory judgment proceedings challenging the validity of wage regulations on public contracts (*Smith-Brooks Printing Co.* v. *Young*, 103 Colo. 199, 85 Pac. (2d) 39; *Denver Bldg. & Const. Trades* v. *Vail*, 103 Colo. 364, 86 Pac. (2d) 267). In Delaware the question as to the rights of bidders is open, as the case cited by petitioners, *Keough* v. *Mayor and Council of Wilmington*, 4 Del. Ch. 491 (Pet. Appendix, p. 12) involved only the question whether the contracting agency could reject all bids and issue new invitations to bid based on different specifications.

[61] *State ex rel. Johnson* v. *Sevier*, 339 Mo. 483, 98 S. W. (2d) 677. In New York, actions for mandamus are summarily dismissed for lack of standing to sue, but prospective bidders may enjoin enforcement of rulings which prevent them from submitting meaningful bids. *Cf. Matter of Gavaert Co.* v. *Greeff*, 262 N. Y. 651, 188 N. E. 106 (mandamus), with *Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384 (contracting agency not allowed to require "pre-qualification" of bidders), and *Burland Printing Co.* v. *LaGuardia*, 9 N. Y. Supp. (2d) 616 (enforcement of "black list" order prohibited).

[62] See cases cited in notes 55 and 59, *supra*.

considered the merits of the particular grievance.[63]

Petitioners rely to some extent on two Federal cases which concerned, respectively, a "low bidder" provision of a city charter[65] and a similar state statute.[64] Both of such cases involved the alleged right to a contract. In the case which petitioners discuss at length (*Colorado Paving Co.* v. *Murphy*, 78 Fed. 28; Br. pp. 40-41), the Circuit Court of Appeals for the Eighth Circuit held that a bidder who alleged that he was the lowest responsible bidder but that the contract had been refused to him because he had offered to furnish "Alcatraz asphalt", a type of asphalt which was equal in quality to other types but which the invitation to bid had "arbitrarily" excluded from consideration, did not have "any such vested right to or interest in the contract" (78 Fed. 28, 30) as to enable him to enjoin its award to another and compel its award to himself.

The decision appears to be correct, for it would seem that a court would really be exercising the discretion vested by law in the contracting officer if it should compel him to enter into a contract for the purchase of a product which he did not

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[63] *Cf.* the following conclusion of the author of the exhaustive annotation of "low bidder" cases in 80 A. L. R. 1282, 1293: "A merely unsuccessful bidder certainly has no contractual right to protect, but it seems to be a fair deduction from the cases as a whole that, upon grounds of public policy mandamus is ordinarily available to such a one to compel the acceptance of his bid for public work where the rejection of the bid, although in the pretended exercise of discretion, clearly appears to have been wholly arbitrary, or fraudulent, and against the interests of the public."

[64] *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A., 8th).

[65] *United States Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A., 6th).

wish to buy. That the decision, however, despite some of the language therein, does not stand even for the proposition that the lowest responsible bidder cannot compel the award of a contract if there is no question as to the discretion of the contracting officer as to the quality of the product,[66] or as to the advisability of rejecting all bids,[67] or otherwise, is clearly shown by the fact that the same court has recently left that very question open.[68].

(c) Respondents do not assert in this case the right to Government contracts if lowest responsible bidders. They do assert the right to submit bids on such contracts without being required to agree, as a condition to having such bids considered, that they will comply with the Determination, which is unlawful and which petitioners are entirely without authority to enforce.

It is apparent from the foregoing summary that the cases under state and local statutes relied on by petitioners do not support their contention that "the great weight of authority" (Br., p. 43) is to the effect that a competitive bidding statute does

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[66] *United States Wood Preserving Co.* v. *Sundmaker*, cited in the last preceding note, involved this question.

[67] In the *Colorado Paving Co.* case, Judge Sanborn seemed to feel, and, it seems, perhaps properly so, that a court should not mandamus the award of a contract if to do so will prevent the contracting officer from exercising his discretion by rejecting all bids.

[68] *Noce* v. *Edward E. Morgan Co.*, 106 Fed. (2d) 746 (C. C. A., 8th), wherein the facts were such as to eliminate any question of discretion, and the question referred to in the text was expressly left open because the plaintiff was not seeking any relief which required that it be decided.

not confer on the lowest responsible bidder the right to a contract in a case in which there is no question of the exercise of discretion by the awarding agency.

Whether or not that contention of petitioners is supported by the authorities is, however, not material in this action, for respondents do not make the claim which petitioners attribute to them. Respondents do *not* assert herein the right to contracts if they are the lowest responsible bidders.

The right that respondents *do* assert herein—a right which they maintain not only exists at common law but is recognized, affirmed and conferred on them by Section 3709, R. S., and the Public Contracts Act—is the right to submit bids on Government supply contracts without being required to agree, as a condition to having such bids considered, that they will comply with the Determination, which is unauthorized by and in violation of the Public Contracts Act and which petitioners are entirely without authority to enforce against respondents.

Petitioners, however, contend (Br., pp. 34, 42) that respondents are claiming not merely that right, but are necessarily asserting a right to the award of contracts because (a) respondents are not prevented by the Determination from bidding, and (b) the mere right to bid "is empty and protection of it futile" unless respondents can compel the award of contracts.

The first suggestion, to which we have already adverted (p. 148, *supra*), is absurd. Petitioners concede that bids will not be considered unless the bidder agrees to comply with the Determination. Accordingly, acquiescence in their first sug-

gestion would indeed make the requirement of competitive bidding a "mockery".[69] As the court below pointed out (R. 400), bidding in the manner petitioners suggest would be but a useless gesture. Petitioners endeavor (Br., p. 42) to distinguish this case from that which would arise if they had "actually prevented the respondents from bidding", but it is too clear for any serious discussion that the imposition of an illegal condition upon the exercise of a right is equivalent to an absolute denial of the right.

Nor is petitioners' second suggestion, to which we have also referred (p. 149, *supra*), of any more weight. This Court will not presume, and it certainly should not be argued here by petitioners, that they will refuse properly to apply the statutes of the United States (including those which require the award of contracts to the lowest responsible bidder) after the law has been interpreted for them by this Court.[70]

The cases relied on by petitioners certainly do not hold that respondents do not have the right which they assert.[71] On the contrary, on the

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[69] *Cf. United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

[70] See *Work* v. *Louisiana*, 269 U. S. 250 (pp. 243-245, *infra*), and *Miguel* v. *McCarl*, 291 U. S. 442, 456. Petitioners themselves, in another portion of their argument (Br., p. 154), contend vigorously that they will apply the law as it shall be laid down by this Court.

[71] Even assuming that the decisions under non-Federal competitive bidding statutes did not affirmatively support respondent's contention, such decisions nevertheless are not authorities against that contention. Those decisions for the most part involved merely the interpretation of competitive bidding statutes in the absence of supplemental statutes relating to the insertion of specific labor provisions in public contracts. But that situation is

occasions in which a situation analogous to that in this case has arisen under competitive bidding statutes, the right has been recognized.[72]

Petitioners, however, state (Br., p. 43) that it would be "a shocking conclusion" if prospective bidders such as respondents should be entitled to the relief sought in this action, although they would not be entitled to compel the actual award of contracts if they should be the lowest responsible bidders. As we have seen (pp. 178-179, *supra*), numerous decisions under State statutes hold that lowest responsible bidders can compel the award of contracts, and there is no conclusive Federal authority to the contrary. Nevertheless, even if respondents could not compel the actual award of contracts if they should be the lowest responsible bidders, their assertion that they are entitled to relief in this action is not so "shocking" as petitioners suggest.

As has previously been shown (pp. 139-147, *supra*), the courts will not hesitate to grant relief against the acts of public officials outside the scope of their statutory authority which interfere with business relations with customers or prospective customers and many of the decisions have been rendered in the face of the precise objection ad-

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entirely different from the one presented here, in that in addition to Section 3709, R. S., Congress has provided in the Public Contracts Act for the insertion in Government contracts of specific labor provisions and has by necessary implication prohibited the insertion of other and different provisions, such as those embodied in the illegal Determination.

[72] *Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384; *Burland Printing Co.* v. *La Guardia*, 9 N. Y. Supp. (2d) 616; *Berry* v. *Tacoma*, 12 Wash. 3, 40 Pac. 414; *Baldwin* v. *Colegrove*, 45 Dauph. (Pa.) 430.

vanced by petitioners herein, namely that the plaintiffs had no judicially cognizable right because they could not have compelled their prospective customers to deal or contract with them.[73] Thus, even if it be assumed that respondents could not compel the award of Government contracts to them, if they were the lowest responsible bidders, it does not follow that they are not entitled to the relief which they seek in this action.

The legislative history of the Public Contracts Act shows (pp. 65-112, *supra*) that, at the time the Act was passed, Congress had in mind that under the pre-existing law any one who desired to bid on a Government contract could do so without making any agreement as to the wages he would pay his employees who would work on the contract if it were awarded to him. The legislative history also shows (pp. 95, 100-101, *supra*) that Congress in passing the Act intended to encourage those employers who would agree to observe the labor standards provided by it in the Act[74] to bid for Government contracts. It is thus entirely consistent to hold, as respondents maintain, that Congress intended that those employers desiring to bid on Government contracts who would agree to the wage provisions authorized by the Act

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[73] See *Truax* v. *Raich* 239 U. S. 33, 38; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535-536; and Mr. Justice Holmes, dissenting, in *May* v. *Woods*, 172 Mass. 11, 14.

[74] It is this intent, particularly, which distinguishes the situation in this case from that in cases such as *Colorado Paving Co.* v. *Murphy*, p. 181. *supra*. We do not believe that even petitioners would say that the remarks which express the *ratio decidendi* of that case are applicable in this case, namely, that the plaintiff is "a stranger to the statute,—one whose interests were not considered or intended to be considered by its enactment" (78 Fed. 28, 31).

should have the right to the protection of the courts against the unlawful action of Government officers acting entirely without authority and seeking to impose other labor standards, without at the same time holding that Congress intended that the lowest responsible bidder should acquire contractural rights against the United States.[75]

Harlan v. *Employers' Ass'n. of Maryland*, 162 Md. 124, 159 Atl. 267, strongly relied on by petitioners (Br., pp. 18, 49-50), was a suit *against the City of Baltimore* itself,[76] and the court held (162 Md. 124, 132; Br., p. 50) that prospective bidders were not qualified "to maintain a suit *against the City*". [Emphasis ours.]

The *Harlan* case, then, is authority only for

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[75] Petitioners confuse standing to sue with the right to equitable relief by contending (Br., pp. 38, 43) that respondents have no right to protect because, since they are mere prospective bidders, their damages are "speculative". Even considered as bearing on the right to equitable relief, however, petitioners' point is unsound, because where, as here, the essence of the damage sustained or threatened is interference with or loss of an *opportunity* to do business, injunctive relief is particularly appropriate because of the very fact that the exact amount of actual money lost might be extremely difficult of proof in an action at law for damages. Cases such as *Pierce* v. *Society of Sisters*, pp. 141-144, *supra*, where injunctive relief was given because of "an interest in *possible* customers" (268 U. S. 510, 536), make that abundantly clear.

[76] Petitioners state (Br., pp. 18, 49) that the suit was against officers of the City, but, as pointed out above, the court treated it as a suit against the City itself, and there is nothing in the opinion, record or briefs in the case which indicates that any defendants were sued otherwise than in their official capacities.

the proposition that a prospective *seller* may not sue his prospective *buyer* to enjoin him from imposing a condition which the seller insists cannot be legally imposed. There is no need for respondents to dispute that proposition here.

Respondents submit, therefore, that the unauthorized action of petitioners in attempting to give effect to and to enforce against them the Determination constitutes an unlawful and unjustified interference with their right, which exists apart from any statutory privilege, to bid and negotiate for contracts of the United States subject only to conditions imposed or authorized to be imposed by Congress and free from unjustified interference by third parties, including Government officers acting beyond the scope of their authority. That right is recognized and reaffirmed by Section 3709, R. S., and the Public Contracts Act. Those statutes, moreover, considered as part of a statutory scheme and in the light of the purposes for which the latter Act was passed, confer on respondents a statutory right or privilege to bid for contracts of the United States free from the imposition of any conditions (in particular, wage conditions) other than those authorized by Congress to be imposed on the exercise of that privilege.

C. Petitioners' contention that the result of permitting respondents to maintain this action would be seriously obstructive to Government activities which are necessary to its general function is without foundation.

Petitioners present various "highly important practical considerations" which they urge require that respondents be denied the opportunity to resort to the courts to protect themselves against petitioners' illegal action (Br., pp. 61-71).

Petitioners claim that "it has been shown *in fact* they (respondents) are claiming a right to judicial review of the award of Government contracts". The simple answer to that is that it is untrue (see pp. 182-183, *supra*), yet petitioners base their entire argument on this point upon that misconception of respondents' position.

Petitioners then point to a number of statutes in which Congress "has blocked out the broad outlines of policies which are to be followed in the performance of Government contracts, and has placed the duty on Government officers to carry these policies into effect" (Br., pp. 62-63). They assert that under such statutes Government officers must exercise discretion and make many close decisions as to which "it cannot be assumed that in every instance a contracting officer reaches the same conclusion as would a disappointed bidder or as would a court" (Br., p. 64). From that they conclude that if "a single disgruntled merchant, dissatisfied with regulations governing eligibility to bid or obtain an award, may, by invoking the aid of the

courts, tie up or hamper the purchasing activities of the Government, the consequences are likely to be far-reaching and serious" (Br., pp. 70-71).

The argument is too specious to warrant taking the time of this Court to analyze the various statutory provisions to which petitioners refer and to show the extent to which they differ from the provisions here under consideration. Here we are concerned with a patent usurpation of power by the Secretary of Labor in open defiance of a clear statutory mandate. It cannot be so lightly assumed that, if this Court should decide that respondents are entitled to relief against the unauthorized and illegal invasion of their rights by petitioners, the ordinary and legitimate activity of Government officials in the plain discharge of their duties will be entirely disrupted.

To take but one of the examples cited by petitioners, the Public Contracts Act requires the contracting officer to determine whether the contract in question is in an amount over $10,000 (Br., p. 63). If the contracting officer should determine that a contract in the amount of $9,000 was within the statute, he would be doing no more violence to the statutory language than the Secretary of Labor has done in this case. Surely no one can reasonably argue that the courts should refuse to curb such illegal action by Government officials merely because it is asserted that to permit such acts to be

called in question may seriously disturb the activities of Government officials generally.[11]

In so far as the instant case is concerned, it cannot be seriously asserted that the decision of the lower court has in any respect impeded the legitimate purchasing activities of the Government. Quite the contrary; as Captain C. W. Fisher, of the Construction Corps of the United States Navy, testified on May 13, 1939, at a hearing before the Senate Committee on Education and Labor on S. 1032 (76th Congress, 1st Session):

> "The minimum-wage determination in the iron and steel industry practically eliminated competition in the industry while it was in effect. The bidding on steel, while the minimum-wage determination was in effect, was confined to two bidders agreeing to the stipulations, and as only one of these could produce steel within the whole range required, the bidding was limited on some items to one bid. Bidding is now normal due to the temporary court injunction suspending this wage determination." [Hearing on S. 1032, 76th Cong. 1st Ses., p. 40.]

Bulletins Nos. 75 to 176, inclusive, of the Division of Public Contracts of the Department of Labor show that during the 51 week period after March 27, 1939, the date of issuance of the injunc-

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[11] *McCafferty* v. *Glazier*, 10 How. Pr. (N. Y.) 475; and *Riker* v. *Oakland Circuit Judge*, 138 Mich. 181, 101 N. W. 229, cited by petitioners, are not in point. They involved the propriety of granting preliminary injunctions which would have suspended, in one instance, street lighting and in the other, street cleaning. *Bancamerica-Blair Corp.* v. *State Highway Comm.*, 265 Ky. 100, 95 S. W. (2d) 1068, also cited by petitioners, has not the slightest bearing upon the question.

tion by the court below, contracts for iron and steel products subject to the Public Contracts Act were awarded for more than $65,000,000, and that during the 51 week period prior to that date the amount of such contracts awarded was only about $32,000,000.

Petitioners concede that State and municipal taxpayers may compel public officers to comply with competitive bidding statutes.

It is fair to assume that suits by State and municipal taxpayers to compel such compliance would be even more disturbing to the activities of State and municipal governments than actions of the character of the present action, because of the scope of the review by the State courts in such suits.

Yet it has never been thought that taxpayers should be summarily turned out of court on the ground that it would be "very disturbing" (Br., p. 62) to State and local officers to be required to comply with the law. Nor is it, insofar as we know, generally believed that practically every function of States and municipalities has been seriously hampered or crippled (Br., p. 62) by such suits, or that such suits constitute a serious threat to the efficient and flexible functioning (Br., p. 70) of State and local governments, or that the courts in which such suits are brought are overwhelmed by the multitude and complexity of the factual, legal and discretionary problems (Br., p. 67) raised thereby.

The truth is that petitioners' attempt to seek refuge in an argument based on "practical considerations" such as they here advance is the plainest indication of their unwillingness to face the issue on the merits in this case.

IX

Respondents are entitled to have the courts hear their complaint that their rights have been invaded, and are threatened with further invasion, by acts of petitioners which are beyond their statutory jurisdiction and authority and are arbitrary and capricious.

Petitioners contend that the courts may not even inquire whether the acts which respondents allege invade their rights are beyond the statutory authority and jurisdiction of petitioners or are arbitrary and capricious.

That contention is but another effort to avoid a decision on the merits in this case, and the answer to it is twofold: (1) Since Section 5 of the Public Contracts Act plainly contemplates judicial review of determinations of prevailing minimum wages, the legality of the acts of petitioners in making and attempting to enforce the Determination may be challenged in this suit; and (2) irrespective of whether Section 5 of the Act applies to such determinations, general principles of law give respondents the right to question petitioners' jurisdiction and authority to act, and, even conceding *arguendo* the *prima facie* authority, to question whether it has been so exercis[1] as to produce an arbitrary and capricious result.

A. Section 5 of the Act requires that wage determinations, as well as other findings, be made after notice and hearing, and contemplates that such determinations shall be subject to judicial review.

The complete texts of Sections 4 and 5 of the Act

are set forth in Appendix I (pp. 3-4). In so far as here material, they provide as follows:

> "Sec. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * *. The Secretary shall appoint * * * an administrative officer, and such attorneys and experts, and * * * such other employees * * * as he may from time to time find necessary for the administration of this Act. The Secretary of Labor *or his authorized representatives* shall have power to make investigations and findings *as herein provided*, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority * * * to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act.
>
> "Sec. 5. *Upon his own motion* or on application of any person affected by any ruling of any agency of the United States in relation to any *proposal* or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall *have the power* to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath * * * relating to the matter under investigation or in question; * * * and *shall make findings of fact after notice and hearing*, which findings shall be conclusive upon all agencies of the United States, *and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States;* and the Secretary of Labor or authorized representative shall *have the power, and is hereby*

authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act." [Italics ours.]

Notwithstanding the fact, pointed out by petitioners (Br., pp. 53-54), that there is a typographical error in Section 5[1], it seems to us that the meaning, purpose and functions of Sections 4 and 5 are perfectly clear, and that petitioners' emphasis that Section 5 "is very inartistically drawn" (Br., p. 53) constitutes a studied effort to avoid the plain, but distasteful, meaning of such section by seeking ambiguities.

The purpose and effect of Section 4 are to set up the mechanics and machinery for the administration of the Act by the Department of Labor, and to specify the division of functions permitted thereunder, as between the Secretary of Labor and her subordinates. Thus the first sentence of said section provides that the Act shall be administered by the Secretary of Labor; and the second sentence provides for appointment of necessary administrative personnel. The last sentence confers the power to make rules and regulations necessary to carry out the provisions of the Act. This and the appointive power above referred to may be exercised by the Secretary alone. The third sentence, however, authorizes the Secretary to delegate certain responsibility for the administration of the Act. Either the Secretary, or any representative authorized by him, may make investigations and

[1] The words "the Secretary or his authorized [impartial] representative", which should precede the words "shall make findings of fact, etc.", were obviously omitted through an inadvertence.

findings as provided in the Act, and prosecute necessary inquiries thereunder in any part of the United States.

The authority thus conferred on the Secretary of Labor, or his authorized representative, is the authority only to make investigations and findings as provided in the Act. Various sections of the Act contemplate that investigations will be made for the purposes therein provided. Sections 1 (b), 2, 3 and 6, authorize the *Secretary of Labor* to make findings, including the factual findings as to prevailing minimum wages contemplated by Section 1 (b). The third sentence of Section 4 was necessary in order to make plain that the Secretary herself need not make such findings, but might authorize them to be made by subordinates. Without such provision, it is doubtful that findings, given the effect provided in Section 5, could be made by subordinates.

Section 5 is the procedural section of the Act. It states how the findings authorized to be made by the Act *shall* be made. They are *required* to be made after *"notice and hearing"*,—a requirement highly suitable to important findings authorized to be made by an executive subordinate. When so made, they are to be conclusive upon all agencies of the United States, "and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States."

Petitioners thus show a fundamental misapprehension of the purport of Sections 4 and 5 of the Act when they say that, since Sections 4 and 5 each contain a "grant of * * * power" to make findings, each must authorize findings of different types (see p. 199, *infra*). Section 5 contains no

grant of power to make findings. It merely specifies *how* the findings authorized by the Act to be made by the Secretary, or his representatives, *must* be made. In marked contrast to the command contained therein as to the method by which findings "shall" be made, is the "power" conferred thereby upon the Secretary of Labor or his representatives to hold hearings and take action incident thereto, and to make decisions.[2]

For the reasons stated, therefore, we believe that the statute on its face (a) requires that wage determinations be made only after notice and hearing; (b) provides that such wage findings, when so made *in accordance with* the authority conferred upon the Secretary and her representatives by the Act, are conclusive upon all Federal agencies; but (c) further provides that such wage findings, when subjected to the judicial review to which the Act contemplates such findings may be subject in a proper case, are binding upon the courts only if supported by a preponderance of the evidence.

None of petitioners' arguments to the contrary is tenable.

1. They argue (Br., pp. 54-56, 140) that the language of Section 5 shows that it is limited in its application to hearings and findings in respect of breaches or violations of the representations and stipulations provided for in Section 1 of the Act, which they describe as "quasi-judicial" in character. The particular point made seems to be that the Secretary may hold a hearing either (1) upon

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[2] That this distinction was deliberately drawn is confirmed by the legislative history of Section 5, discussed *infra*.

his own motion, or (2) on application of any person affected by any ruling of any agency of the United States in relation to any *proposal*[3] or contract involving any of the provisions of the Act, but, *in either event, only* (3) on complaint of a breach or violation of a representation or stipulation provided for in Section 1 of the Act.

This argument is predicated on the proposition that the word "and", preceding the words "on complaint of a breach" etc., in the first sentence of Section 5, is employed therein in its conjunctive sense. But it is perfectly plain that the term "and", as so employed, is used in its disjunctive sense to mean "or" or "as well as".[4] Otherwise, the Secretary of Labor would be deprived of authority to hold hearings upon her own motion in respect of any matter arising under the Act; and, specifically, she could not hold such hearings in respect of any ruling of any agency of the character above referred to, or, indeed, in respect of a breach or violation of any representation or stipulation, unless a complaint of such a breach or violation (which might and probably would have nothing to do with the ruling in respect of which she might hold the hearing) happened to be filed with her.

It is astonishing that petitioners should make such contention when the Rules of Practice of the Division of Public Contracts of the Department of Labor itself (Part I, 11 (a)) expressly provide to the contrary, as follows:

[3] A "proposal" is a bid.

[4] Webster's New International Dictionary (2nd Ed., 1939), p. 98:

> "In legal language, *and* is interpreted as if it were *or*, and vice versa, whenever this construction is plainly required to give effect to the intention of the person using it * * *."

"(a) After a report of a breach or violation has been filed, *or upon its own motion and without any report of a breach or violation having been previously filed*, the Department may issue and cause to be served upon the respondent a formal complaint stating the charges and containing a notice of hearing * * * ." (Italics ours.)

2. Petitioners further contend (Br., pp. 55-56) that to read Section 5 as applicable to wage determinations would make the third sentence in Section 4 mere surplusage, since Sections 4 and 5 each grant power to make findings,—the first, with respect to wage determinations, the second, with respect to violations of contract stipulations. This argument has already been disposed of above.

3. It is further argued (Br., p. 60) that, since Section 5 provides that findings are not binding on the courts unless supported by "the preponderance" of the evidence, a holding that such section is applicable to wage determinations would run counter to the alleged Congressional trend with respect to the weight to be given "quasi-legislative" findings. It is said that no such inconsistency with the trend is involved in requiring such preponderance for "quasi-judicial" findings with respect to violations of contract stipulations; and presumably the same position would be taken in regard to all other findings covered by Section 5, such as findings in respect of a ruling by a contracting officer that a particular bidder's proposal could not be considered because he was not a "manufacturer or regular dealer" (§ 1 (a)).

But the trend of modern statutes has been to

make conclusive *all* administrative findings of fact, whether quasi-legislative or judicial, if supported by substantial evidence. This statute is an exception. And the immediate problem is one of giving effect to its provisions as written; not of criticizing the theory underlying such provisions.

4. Petitioners also urge that there is nothing in the legislative history of Section 5 to indicate that it was intended to apply to wage determinations (Br., p. 60). With that unsupported statement we take sharp issue.

B. The legislative history of the Act clearly shows that it was the intention of the Congress that a hearing should be held by the Secretary prior to a determination of prevailing minimum wages.

1. The Walsh bill.

The Walsh bill, as originally introduced (S. 3055, 74th Cong., 1st Sess.; see p. 73, *supra*), did not contain any provision with regard to hearings.

At the Senate Committee hearings on the Walsh bill, however, it was urged by John C. Gall, Associate Counsel of the National Association of Manufacturers, that such bill be amended so as to make provision for a procedure which would give affected industries the opportunity for a hearing before a determination of minimum wages and maximum hours, such hearing to be followed by findings conforming to a statutory standard.[5]

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[5] Hearings before the Committee on Education and Labor, U. S. Senate, 74th Cong., 1st Sess., on S. 3055, June 17, 1935, pp. 32-33.

Thereafter, the bill was completely rewritten by the Senate Committee, and as so rewritten, passed the Senate, without any change here material, on August 12, 1935. A copy of the bill, as thus passed, is set forth in Appendix IV.

As hereinbefore noted (p. 74, *supra*) such bill authorized the President, who was in turn authorized to delegate his authority to an agency (§ 10), to determine minimum wages and maximum hours which should be fair and reasonable, taking into account certain standards (§ 8). Section 5 of such bill, insofar as here material, provided as follows:

> "Sec. 5. Upon his own motion, or on complaint of a breach or violation of a representation, agreement, or covenant made as herein provided, the President shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence. * * * and the President *shall have the power* to make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the evidence, shall be conclusive upon review by the courts, and the President shall have the power, and is hereby authorized, to make such decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of this Act." [Italics ours.]

Whether or not the bill, as so passed, required a hearing prior to a wage determination cannot be stated with definiteness. It would seem, however, that the provisions of Section 5 clothing the President (or the agency to which he might delegate re-

sponsibility) with power to make findings of fact after notice and hearing were intended to be mandatory, since Section 8 authorized him to determine only "fair and reasonable" wages in the light of specified standards.

2. The Healey bill.

As previously noted, the Walsh bill was not reported out of the House Judiciary Committee, to which it was referred, during the First Session of the 74th Congress (see p. 75, *supra*). As also noted, at the Second Session of the 74th Congress, the Healey bill (H. R. 11554-74th Cong., 2nd Sess.), a copy of which is set forth in Appendix V, was introduced.

The substantive provisions of the Healey bill have been summarized at an earlier point (*supra*, pp. 75-77). As there stated in greater detail the Secretary of Labor was authorized by Section 9 to determine minimum wages and maximum hours, the minimum wages so fixed to be fairly and reasonably commensurate with the value of the service or class of service rendered and to be established by the Secretary, who was not to be "bound by any technical rules of *evidence* or procedure", in the light of certain permissive standards. Section 7 of the Healey bill, insofar as here material, provided as follows:

> "Sec. 7. Upon his own motion, or on complaint of a breach or violation of a representation, agreement, or covenant made as herein provided, the Secretary of Labor or representative designated by him shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses

> and the production of evidence under oath. * * * and the Secretary *shall* make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the evidence, shall be conclusive upon review by the courts; and the Secretary shall have the power, and is hereby authorized, to make such decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of this Act." [Italics ours.]

The Healey bill thus removed any ambiguity which may have existed in the Walsh bill with respect to the matter now under consideration. It deliberately changed the corresponding provisions in the Walsh bill so as to require that the findings, which would be necessary for wage determinations, should be made after notice and hearing.

3. The hearings on the Healey bill.

At the hearings held on the Healey bill by the sub-committee of the House Committee on Judiciary (see p. 77, *supra*), Gerard D. Reilly, Acting Solicitor of the Department of Labor, presented a letter from Secretary Perkins in which she stated, *inter alia* (Hearings, p. 125):

> "There are one or two changes * * * which I should like to propose to you * * *. The first is with reference to the provisions of the bill common to sections 6, 7, 8 and 9 which place sole responsibility for making findings of fact under the Act upon the Secretary of Labor. In view of the fact that questions of fixing minimum wages and maximum hours * * * are of a highly controversial nature, it

seems to me unwise to place the responsibility for deciding such questions upon a Cabinet officer whose *administrative* duties under the organic act creating the Department of Labor make it important that the incumbent of the office maintain friendly relations with both industry and labor * * *. I * * * feel strongly that the administrative and *quasi-judicial* functions incident to your bill should be separated.

My suggestion is that the bill contain provisions authorizing the creation of a wage and hour board in the Department of Labor.

* * *

* * * the board would have sole responsibility for all *quasi-judicial* functions vested in the Secretary by the Bill.

* * * * * *

In accordance with these suggestions I am enclosing for your consideration a copy of the bill containing draft amendments to sections 6, 7, 8 and 9. As you will observe, the amendments to section 6 provide *merely for the mechanics of setting up the board.* The amendments to sections 7 and 9 chiefly consist of inserting the word "Board" in lieu of "Secretary of Labor." The amendments to section 8 are of the same character * * *." [Italics ours.]

The amendment to Section 6 of the Healey bill which the Secretary submitted (Hearings, p. 126), was, insofar here material, as follows:

"SEC. 6. (a) The Secretary of Labor is hereby authorized to administer and enforce the provisions of this act and to create in the Department of Labor a unit for this purpose and a wage-and-hour board composed of three

persons (hereinafter referred to as the Board). The Secretary of Labor is further authorized to appoint * * * the Board members, an administrative officer, and attorneys, and * * * such other employees as he may find necessary to administer this Act. * * *.

"The Board shall have power to make investigations and findings *as hereinafter provided*, and such findings shall not be subject to review by any person or agency in the executive branch of the Government.

"(b) The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. * * *.

"(c) The Secretary of Labor shall have authority from time to time to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act."

The amendments to Sections 7, 8 and 9 conformed to the description in Secretary Perkins' letter (Hearings, pp. 126-127).

Subsequently, Secretary Perkins appeared before the Committee, and testified in support of her amendments, as follows (Hearings p. 224):

"I would like also to ask your consideration of the suggestion I made in my letter with regard to the administration. I think the administration of this bill should be, as you have indicated, in the Department of Labor. But I wish to suggest the great desirability of separating the administration and the quasi-judicial functions involved in this bill. I do not think any one individual, and certainly not a Cabinet officer, who has a great variety of duties under the basic act creating the

executive department, ought to be asked or allowed to take full responsibility for the performance of *so important a quasi-judicial function as the setting of minimum wages* and maximum hours * * *.

"I think such a function should be performed by a group of persons, by not less than three, *and only after they have held a public hearing* at which everybody in interest can at least register his idea of what is proper as to wages, hours, and all that sort of thing." [Italics ours.]

It is apparent from the foregoing that the Secretary thought that the making of a wage determination involved quasi-judicial action; that determinations by the board the establishment of which she recommended would only be made after public hearing; and that such public hearing would be held pursuant to the provisions of Section 7. And this conclusion is supported by the specific wording of the amendment offered by the Secretary to Section 6, which provided: "The Board shall have power to make investigations and findings as hereinafter provided, * * *." The latter three words obviously refer to Sections 7 and 9.

4. The revision of the Healey bill.

Following the hearings the Healey bill was revised by the House Judiciary Committee, and was enacted in substantially the form in which it was thus revised (p. 93, *supra*).

Sections 6 and 7 of the original bill were renumbered Sections 4 and 5, respectively, and many of the changes recommended by the Secretary were adopted. Although the Secretary was not authorized, in terms, to create a board which would be

entirely independent of her, delegation of authority in respect of certain of the matters covered by her amendment was permitted by an amendment of Section 7 (renumbered Section 5), which authorized representatives of the Secretary to make decisions necessary to enforce the provisions of the Act, and by an amendment of Section 6 (renumbered Section 4), which authorized either the "Secretary of Labor or his authorized representatives * * * to make investigations and findings as herein provided * * *".

In the latter connection, it is significant to note that whereas the Secretary's suggested amendment of Section 6 had referred to "findings as *hereinafter* provided", at a time when both the provisions of the bill requiring findings to be made after notice and hearing and the provisions of the bill authorizing wage determinations were contained in sections following Section 6, the Committee revision of Section 6 (renumbered Section 4) changed this language to read "findings as *herein* provided", contemporaneously with the shift of the wage provisions of the bill to Section 1 (b).

In the revision of Section 7 of the Healey bill, renumbered Section 5, the material changes effected were as follows (insertions being indicated by italics and deletions by matter in brackets):

> "Sec. [7.] 5. Upon his own motion [,] or *on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and* on complaint of a breach or violation of [a] *any* representation [agreement,] or [covenant made] *stipulation* as herein provided, the

> Secretary of Labor, or *an impartial* representative designated by him, shall have the power to hold hearings * * *; and [the Secretary] shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the *preponderance of the* evidence shall be conclusive [upon review by the courts] *in any court of the United States;* and the Secretary *of Labor or authorized representative* shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act."

The obvious purposes of the revisions so effected were (1) to provide an additional occasion for the holding of hearings, viz., upon application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of the Act; (2) to require that any representative designated by the Secretary to hold hearings should be impartial; (3) to provide that the findings of fact of the Secretary should be conclusive upon judicial review in the courts only if supported by a "preponderance of the evidence" (as distinguished from "the evidence"); and (4) as above stated, to authorize "decisions" by representatives of the Secretary.

5. The statements made by Representative Healey on the floor of the House that hearings must be held prior to wage determinations.

In the course of the debate on the floor of the House prior to passage of the bill, Representative Healey twice stated, in terms, that it required a

hearing by the Secretary prior to a determination of prevailing minimum wages. In outlining briefly the provisions of the bill and in answering questions, he made the following remarks:

> "Section 5 is the procedural section * * *. The Secretary may only make findings after proper notice and hearing. (80 Cong. Rec. 10002)
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> * * * * * *
>
> "* * * As I view it, the prevailing wage is a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is." (80 Cong. Rec. 10003)
>
> * * * * * *
>
> "The prevailing minimum wage will be determined, presumably, before a contract is entered into. In other words, *the Secretary of Labor will have to conduct an investigation, hold hearings*, and take whatever steps are necessary to determine the prevailing wage, before the wage provisions of this bill become effective under section 11. Until that is determined, no minimum-wage provision will be included in a contract."
>
> * * * * * *
>
> The prevailing wage will be determined for the general locality. It will be, as I have stated, by investigation and *hearing*." (80 Cong. Rec. 10023) [Italics ours.]

The foregoing review of the legislative history of Sections 4 and 5 of the Act confirms beyond dispute, we believe, that the provisions of Section 5 require a hearing [6] by the Secretary prior to a de-

[6] Petitioners concede that it has been the consistent administrative practice to hold hearings prior to making determinations of prevailing minimum wages; and also that

termination of prevailing minimum wages, and that such section expressly contemplates judicial review by the courts of such a determination.

It is equally clear that upon such review all questions of law, such as "the construction to be placed upon the language of Section 1(b) of the Public Contracts Act", are to be determined by the court, and that the Secretary's rulings with respect thereto are not to be conclusive or to be given any effect unless correct. Section 5 provides that only the Secretary's findings of fact shall be conclusive in the courts, and then only "if supported by the preponderance of the evidence."

C. Even if Section 5 of the Act does not apply to determinations of prevailing minimum wages, the court below had jurisdiction, since the Act does not contain a specific provision to the contrary, to consider and decide respondents' claims that the action of petitioners complained of herein was beyond their statutory jurisdiction and authority.

Since the Public Contracts Act does not expressly provide to the contrary, the question whether the acts of petitioners complained of herein were beyond their jurisdiction and authority was properly considered by the court below.

Even in fields in which the subject matter of an administrative determination is within the cate-

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such hearings are "perhaps indispensable to a wise administration of the Act." (Br., pp. 140-141.)

It is well established that the consistent practice of holding hearings, prior to administrative action, affords support to the contention that the applicable statute, if ambiguous, requires hearings (*Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 336-337).

gory of matters which Congress can constitutionally commit to the exclusive jurisdiction of the executive branch of the Government, it is well established that the courts have power to entertain a bill in equity brought for the purpose of restraining or undoing unauthorized or arbitrary and capricious acts of administrative officers which invade or threaten to invade the rights of private parties.

In such a case the function of the court is not, it seems, that of "review", in the sense in which that term is most often used, but, rather, one of control. That is, in such a case, the court, in the exercise of its ordinary equity jurisdiction, is simply called upon to determine whether the act of the administrative official which invades or threatens to invade a private right is an act within the statutory authority of such official which, of course, never includes a grant of power to act arbitrarily and capriciously. The function of the court is well illustrated in the instant case where petitioners claim that their admitted interference with respondents' business relations is justified by the fact that they are acting in discharge of their official duties as Government officers. The power of the court in determining the issue so presented does not depend on any express statutory grant of the power to review the acts of such Government officers. In the exercise of its ordinary equity jurisdiction the court is empowered to inquire into the legality of their acts, unless it has been deprived of such power by a specific statutory prohibition.

The applicable rule in such cases was stated as follows by Mr. Justice Brandeis in the dissenting opinion in *Crowell* v. *Benson*, 285 U. S. 22, 89-91:

"With respect to them [administrators of matters which Congress may commit to conclusive executive determination] the function of the courts is not one of review but essentially of control—the function of keeping them within their statutory authority. No method of judicial review of the administrative action had been provided by Congress in any of the cases cited; * * *. In each case, the Court held that, if the administrative officer had acted outside his authority, the unwritten law supplied a remedy, and that relief could be had, according to the nature of the case, on bill in equity or habeas corpus. The question decided in each case was that *Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer.* See American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 110, 23 S. Ct. 33, 47 L. Ed. 90." [Italics ours.]

In *Waite* v. *Macy*, 246 U. S. 606, the court enjoined the Tea Board from attempting to enforce a regulation of the Secretary of the Treasury prohibiting the importation of tea containing any coloring matter. The statute under which the Secretary purported to act prohibited the importation of tea which was "inferior in purity, quality and fitness for consumption" to certain specified standards which contemplated that the tea should be tested "according to the usages and customs of the tea trade," and empowered the Secretary of the Treasury to enforce the statute by regulations. This Court held that the regulation in question was beyond the Secretary's power

under the statute and granted the injunction, saying, in part (246 U. S. at pp. 608-609):

> "* * * The Government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.
>
> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that *the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption.* * * *" [Italics ours.]

and (at p. 610):

> "The Secretary and the board must keep within the statute, *Merritt* v. *Welsh*, 104 U. S. 694, which goes to their jurisdiction, see *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544, and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620. *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492. *We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights.*" [Italics ours.]

In *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, the plaintiff was granted an injunction enjoining a local postmaster from giving effect to an order of the Postmaster General whereby such postmaster was directed to mark letters addressed to the plaintiff "fraudulent", to return such letters to the senders and to refuse to honor money orders drawn in the plaintiff's favor. The statute authorized such action

"upon evidence satisfactory" to the Postmaster General that any person was engaged in conducting a scheme for obtaining money through the mails by means of fraudulent pretenses. The defendant demurred to the complaint and the demurrer was overruled and the decision of the District Court was affirmed by this Court.

The Court held that, on the facts stated in the complaint and admitted by the demurrer, the Postmaster General had acted under a mistake of law and, his order not being within the statutory authority, its enforcement would be enjoined.

The Court said (187 U. S. at p. 107):

> "Conceding, for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, * * * the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter, when the statutes have not granted him power so to order. * * *"

and (at p. 108):

> "That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. *The acts of all its officers must be justified by some law, and in case an official violates the law to the injury*

of an individual the courts generally have jurisdiction to grant relief." [Italics ours.]

and (at pp. 109-112):

"Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. * * * *If the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part,* because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. * * *

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and *his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncon-*

*trolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. * * *"*

"The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, * * *. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet *such decision, being a legal error, does not bind the courts.*" [Italics ours.]

In *Gegiow* v. *Uhl*, 239 U. S. 3, petitioners sought a writ of *habeas corpus* for the release of immigrants held under a deportation order issued by the Acting Commissioner of Immigration. The Commissioner had purported to issue the order under a statute providing for the exclusion of a person "likely to become a public charge". The conclusion that the petitioners were likely to become public charges was based upon a finding that they were bound for Portland, Oregon, where bad industrial conditions had been reported.

This Court granted *habeas corpus* on the ground that the reasons assigned for the issuance of the deportation order were insufficient and showed that it was issued under a clear mistake of law and in excess of the power conferred by the statute. The Court said, in part (239 U. S. at p. 9):

"The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. *The statute by enumerating the*

conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, relied on by the Government. As was said in *Gonzales* v. *Williams*, 192 U. S. 1, 15, 'as Gonzales did not come within the act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.' Such a case stands no better than a decision without a fair hearing which has been held to be bad. * * *" [Italics ours.]

In *Work* v. *Louisiana*, 269 U. S. 250 (discussed at pp. 243-245, *infra*), the State of Louisiana sought by a bill in equity to restrain the Secretary of the Interior from illegally requiring it, as a condition precedent to consideration of its claim to certain swamp lands under various acts of Congress, to show that the lands were non-mineral in character. This Court granted that relief, and in the course of its opinion stated (269 U. S. at pp. 254, 260):

"In short, it is merely a suit to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character.

"It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect.

* * * * * *

"We conclude that the Swamp Land Acts granted to the States the swamp and overoverflowed lands, rendered unfit for cultivation, without reference to their mineral character; and that in requiring the State to establish the non-mineral character of the lands in question the Secretary exceeded the authority conferred upon him by the acts and attached this condition to the prosecution of the claim of the State without warrant of law." [7]

Petitioners contend that it will be "inappropriate" in this case to "read into the Public Contracts Act judicial reviewability of wage determinations", because, they say, this case "concerns the strictly nonregulatory functions of the Government" (Br., pp. 60-61). The question, however, is not whether the Court should read into the Act "judicial reviewability" of the Determination but whether it should read into the Act "judicial *non*-reviewability" of the action of petitioners beyond their authority in attempting to enforce the Determination against respondents. The two cases

[7] For other authorities to the effect that the courts will disregard action by an administrative body or officer not authorized by statute, or which is based on an error of law, see *Philadelphia Company* v. *Stimson*, 223 U. S. 605; *Kessler* v. *Strecker*, 307 U. S. 22; *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *United States* v. *State of Idaho*, 298 U. S. 105; *Merritt* v. *Welsh*, 104 U. S. 694; *Iselin* v. *United States*, 270 U. S. 245; *Chic., M. & S. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99; *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed. 579 (U. S. D. C., E. D. N. Y.); *Wisconsin Cent. R. R.* v. *Forsythe*, 159 U. S. 46; *Daniels* v. *Wagner*, 237 U. S. 547; *Ickes* v. *Virginia-Colorado Development Corporation*, 295 U. S. 639; *Santa Fe Pac. R. R.* v. *Lane*, 244 U. S. 492; *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *George*, 228 U. S. 14, 21; *Haskin Bros. & Co.* v. *Morgenthau*, 85 F. (2d) 677, 684 (Ct. App. D. C.); and *Degge* v. *Hitchcock*, 229 U. S. 162, 171.

cited by petitioners certainly do not support their position that such a prohibition should be read into the Act,[8] and the cases which we have just discussed are direct authorities against that position.

Petitioners urge that Congress intended that determinations of prevailing minimum wages, even though made in excess of the jurisdiction of the Secretary of Labor under the Act, should be absolutely final and binding. We doubt that an unexpressed intent of Congress may *ever* be shown clearly enough to outweigh the weighty reasons that have led the courts to require that there be a "specific provision" depriving the courts of jurisdiction before it will be held that Congress intended "to subject the individual to the uncontrolled action of a public administrative officer."[9]

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[8] *Work* v. *Rives*, 267 U. S. 175, held that mandamus would not lie to reverse a decision by the Secretary of the Interior disallowing a claim made against the United States under a statute which authorized the rejection of claims unless the Secretary "was satisfied that they were just and equitable", made his decisions "conclusive and final" and expressly forbade resort to the courts to review his decision (see 267 U. S. at 182). *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127, was a similar case, and held, in substance, that Congress by creating a special tribunal to hear and determine claims against the United States necessarily intended that tribunal finally to determine the questions of law and fact that arose in the course of passing on a claim. *Cf. Dismuke* v. *United States*, 297 U. S. 167. Such cases, where the contention of the plaintiffs was, in substance, that Congress had intended to create a right against the United States which could be enforced in court, are not relevant here where the issue is whether Congress intended that the courts should entertain suits to keep petitioners from injuring respondents' rights by action outside of the jurisdiction and authority of petitioners.

[9] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; Mr. Justice Brandeis, dissenting in *Crowell* v. *Benson*, 285 U. S. 22, 91.

Utah Fuel Co. v. *Coal Commission*, 306 U. S. 56, certainly justifies that doubt. In that case, it was admitted that Congress could have authorized the Bituminous Coal Commission to make public the details of certain cost reports which had been filed by the complainant with the Commission. The Commission, believing that Congress had (as the Court held it had) so authorized it, directed its employees to make such returns public on a certain date. The Bituminous Coal Act provided a method for judicial review of certain orders of the Commission, but the order directing the publication of such returns was not covered by those provisions of the Act. The complainant brought a bill in equity to enjoin the threatened disclosure. The Commission contended, and the Court of Appeals of the District of Columbia agreed, that, since the Act provided a method of review of the Commission's acts in certain cases it impliedly excluded review in all others and, therefore, the suit could not be maintained.

This Court, however, while affirming on the merits the decree of the District Court dismissing the bill, expressly held (306 U. S. at 60) that "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity."

Judicial reviewability in the present case must follow *a fortiori*, since the petitioners' claim of an implied statutory prohibition of review in the circumstances here presented does not even have the support of a statutory procedure for review under other circumstances.

Petitioners, moreover, have not sustained their claim of an implied statutory prohibition against the maintenance of this action. They have not shown in any way that Congress in passing the Public Contracts Act intended that determinations of prevailing minimum wages made by the Secretary of Labor in excess of her statutory authority and jurisdiction should not be open to question in the courts at the suit of one whose rights were invaded thereby.

Petitioners' contention that Congress did have such an extraordinary intent is premised on their statement that the Secretary's determination of a prevailing rate of wages under the original Bacon-Davis Act[10] could be challenged only for fraud, dishonesty or bad faith. Petitioners proceed from that assumption to state that there is nothing in the legislative history of the 1935 amendment to the Bacon-Davis Act (which amendment, it will be recalled, provided for the pre-determination of wage rates prior to the issuing of invitations to bid) to indicate "that the Congress intended to lessen in any way the binding character of the Secretary's decisions" under the original Act (Br., p. 58). Petitioners then argue that since the Public Contracts Act was considered by Congress to be an extension of the amended Bacon-Davis Act into new fields, "it is proper to assume that Congress carried over into the new statute its desire that a determination of prevailing wages be entirely free from review" (*ibid.*).

The principal authority which petitioners cite to support their assumption that the Secretary's determinations under the original Bacon-Davis

[10] Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494.

Act were not open to question in the absence of fraud, dishonesty or bad faith is *Gillioz* v. *Webb*, 99 Fed. (2d) 585 (C. C. A., 5th).

That case was an action by an employee against his employer, a contractor under a construction contract let pursuant to the original Bacon-Davis Act, to recover the difference between the compensation paid him for his services and compensation at the rate determined by the Secretary of Labor to be the prevailing wage for work of a similar nature in the locality.

It was held that the inclusion in the *contract* of the provision of the Act that in case of a dispute as to prevailing wages the Secretary's decision thereon should be conclusive on the parties to the contract rendered the Secretary's decision final in the absence of bad faith or dishonesty, since the parties had themselves provided that she was to be the arbitrator.[11]

It was *not* held that if the Secretary of Labor had acted beyond his statutory authority his act would be final. And in *United States* v. *W. S. Barstow & Co.* 79 Fed. (2d) 496 (C. C. A. 4th), it *was* held that such an act must be disregarded as ineffective.

In that case an action was brought by laborers against a contractor to recover, in respect of the period prior to April 1, 1932, the difference between the wages actually received by them and wages calculated at the higher prevailing rate of

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[11] In *United States for the use of Boucher* v. *Murphy*, 11 F. Supp. 572, the second Bacon-Davis Act case cited by petitioners (Br., p. 57), it was held that employees could not sue for an alleged under-payment of wages, since they had not referred their claim to the Secretary of Labor.

wages that had been determined by the Secretary of Labor pursuant to the provisions of the original Bacon-Davis Act. The decision of the Secretary had been announced on March 3, 1932, but the Secretary subsequently ruled that it was to become effective on March 30. The Circuit Court of Appeals held that the Secretary was not authorized, when he had once found that the rates prevailing at a particular time differed from the rates then being paid by a contractor, to postpone or defer the time when his finding should become effective. Therefore, his ruling "must be disregarded as ineffectual" (79 Fed. (2d) at 498).

We do not believe that the 1935 amendment to the Bacon-Davis Act had the effect of providing that determinations of prevailing wages by the Secretary of Labor thereunder, even though made in excess of her authority, should not be subject to judicial review. On the contrary, it seems obvious that, if the Secretary of Labor, purporting to act under that amendment, should attempt to determine the wages for mechanics and laborers employed in the construction of a public building in Philadelphia upon the basis of the wages that she found to be prevailing elsewhere in the United States, her determination would be a nullity and would be subject to review.

Regardless, however, of what may have been the Congressional intent under the Bacon- Davis Act, the legislative history of the Public Contracts Act (see pp 65-112, *supra*), which shows clearly that Congress did not intend to grant to the Secretary of Labor any broad discretionary powers, but on the contrary, intended to confine her activities within narrow bounds, certainly negatives any

idea that Congress intended to deprive the courts of their ordinary equitable jurisdiction to grant relief against activities outside those statutory bounds.

We have shown, thus far under this Point IX, (a) that the Public Contracts Act expressly contemplates that determinations of prevailing minimum wages by the Secretary of Labor shall be subject to judicial review in a proper case; and (b) that, even if that were not the case, the Act does not forbid such review under the circumstances presented here, for the reason that, even if a presumed intent of Congress could supply the need for a "specific provision" prohibiting review, no such intent has been shown.

We come now to the question of the scope of the judicial review available in this action.

D. Whether the Determination be reviewable under Section 5 of the Act or on general equitable principles, the Court may determine (a) whether petitioners are exceeding their statutory authority in attempting to enforce the Determination against respondents and (b) whether the Determination is arbitrary and capricious.

The minimum scope of the judicial review appropriate in this case is clear, whether considered on general equitable principles or under Section 5 of the Act.

1. The jurisdiction of the Secretary of Labor under the Public Contracts Act is limited by the term "locality" as it is employed in Section 1(b) thereof.

The authority conferred by the Act upon the Secretary of Labor is the authority to determine prevailing minimum wages in the several "localities" in which particular Government supplies are to be produced pursuant to contract. The Secretary has no authority to determine minimum wages prevailing on the continent of North America, or in the United States, or in "regions" or "sections" or "broad geographical areas" of the United States. She must determine such wages *only* in "localities."

The proper construction of the term "locality" as used in Section 1(b) of the Act is a question for this Court. As appears on the face of the Determination (R. 239), the principal question which petitioner McLaughlin purported to decide therein, and that which underlay all other questions which he purported to decide (other than the definition of the Iron and Steel Industry), was "the construction to be placed upon the language of Section 1(b) of the Public Contracts Act," and, particularly, the proper construction of the word "locality."

The legal premise, therefore, upon which the entire Determination was based, and in reliance on which the Acting Secretary selected the six large regions as "localities", was unsound, if the Acting Secretary proceeded upon an "interpretation" of the term "locality" which is untenable and erroneous as a matter of law.

Petitioners have sought to obscure the true issues in this case by implying, in substance, that the only question presented is whether the Acting Secretary abused his discretion. But it is manifest that, before one may properly discuss any question of the exercise or abuse of discretion, one must

determine the field within which, under the particular statute in question, the discretion is to be exercised. That is a pure question of law.

Under Section 1(b) of the Act, it is only within "localities" that prevailing minimum wages may be determined. The content of the word "locality", therefore, delimits the field within which the Secretary of Labor is to exercise such discretion as the Act vests in her. If she attempts to determine wages in other than "localities", she is not exercising her discretion—she is exceeding her statutory authority and jurisdiction. The Act certainly does not confer upon the Secretary of Labor any discretion to determine the extent of the power which Congress thereby intended to give her.

2. It is for the Court to determine the scope of the jurisdiction which the Act gives to petitioners, and the question whether they were or were not "unreasonable" or "arbitrary and capricious" in believing that they had the jurisdiction which they purported to exercise is not relevant on that issue.

It is established beyond question, by the cases which we have cited and discussed at pp. 211-218, *supra*, as well as others,[12] that the question of the scope of the jurisdiction conferred by statute upon an administrative officer is a question of law for the courts.

Petitioners, however, contend, in substance, that the Secretary of Labor may *determine her own*

[12] Including *Perkins* v. *Elg*, 307 U. S. 325 (see pp. 258-260, *infra*,) and *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329 (see p. 232, *infra*).

jurisdiction. Noting the obvious fact that the term "locality" is not a mathematically precise word like "acre" or "square mile", petitioners argue that the Secretary must of necessity, therefore, have discretion to determine the proper construction of "locality", discretion, i. e., to determine what her jurisdiction is. They argue that "even if this Court should disagree with the construction" which petitioners urge, "and might come to a different conclusion if the question were presented as an original proposition", nevertheless, if "the construction has been shown to be tenable and reasonable, and in no way arbitrary or clearly erroneous", that construction is binding on this Court.[13] (Br., p. 135). This unusual suggestion is altogether untenable.

There are, of course, many instances in which an executive or administrative officer may employ a sound discretion in *exercising the jurisdiction* conferred upon him by law. But it has never been held or suggested that an executive or administrative officer has the power or discretion finally and conclusively to determine *what his jurisdiction is* by construction of the statute delimiting the scope of his authority or otherwise.[14]

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[13] Petitioners also put their argument thus (Br., p. 137): "In the absence of a statutory method of review, the courts have sought only to keep the actions of the administrative official within the bounds both of reason and of his jurisdiction." If by that somewhat ambiguous statement petitioners mean that a court will not enjoin action by an administrative official, beyond his jurisdiction and to the injury of a complainant, unless the court feels that the official was unreasonable in exceeding his jurisdiction, the statement is absolutely without authority or reason to support it.

[14] Certainly, none of the cases cited by petitioners (Br., pp. 134-139) so holds.

Stated differently, it is perfectly plain that the Secretary may not, in the exercise of discretion or otherwise, determine the meaning of the term "locality", as employed in the statute, and thereby bind the courts or any one else to *her* conception of what her jurisdiction is under the statute. However, *within the limits of her jurisdiction*, as determined by the proper judicial definition of the term "locality", she may, in her sound discretion, ascertain prevailing minimum wages in such units of territory as are comprehended by such definition of the term "locality".

In none of the leading cases relied on by respondents was the inquiry into the extent of the statutory authority and jurisdiction of the defendant framed along lines of whether the construction of the statute by the defendant was a reasonable one, nor did the court inquire either whether the action complained of was *only a little* beyond the authority conferred or whether it was arbitrarily and capriciously so.

The exceptional principle [15] which petitioners seek to invoke in this case (namely, that the interpretation of a statute by an executive officer will be accepted by the courts if not unreasonable or arbitrary or capricious) has been applied almost exclusively in cases involving mandamus or mandatory injunction similar in effect.[16]

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[15] The general rule is stated in *Chi., M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, as follows: "But the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves." In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 134, n. 11, this Court stated: "To be sure, statutory construction is a judicial function."

[16] The issuance of a mandatory injunction is "governed by like considerations" as the issuance of a mandamus

If, in the performance of his function of carrying out the laws, an executive officer reasonably believes that he would, by taking particular action, violate a statute which he is sworn to carry out, a wholesome respect for a coordinate branch of the Government impels the courts not to force him to take such action.

Such considerations have no application, however, in a case, such as this, where the grievance is that an executive officer, by misconstruing a statute defining the scope of his jurisdiction, *has acted*, or is threatening to act, in excess of that jurisdiction, to the injury of the rights of the plaintiff. In such a case, the executive officer is sued primarily in his individual capacity and, as a defendant accused of a wrong to private rights, can justify himself only by showing that his action or threatened action is authorized by law.[17]

On the few occasions when the exceptional principle to which we have referred has been applied in other than mandamus cases, the statute involved has been construed to vest in the administrative officer in question the jurisdiction to determine, within prescribed limits, questions of law.[18]

It is clear that the Public Contracts Act does not grant to the Secretary of Labor any such broad power. On the contrary, the only authority vested in her is that of *ascertaining an existing fact*, viz.,

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when it is used for the same purpose, viz., to compel, directly or indirectly, the performance by an executive officer of an official duty. *Miguel* v. *McCarl*, 291 U. S. 442, 452.

[17] See cases cited under Point X, *infra*.

[18] *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Work* v. *Rives*, 267 U. S. 175, 183 (Land Department); *cf. Work* v. *Louisiana*, 269 U. S. 250 (see pp. 243-245, *supra*); *Santa*

the prevailing minimum wage paid in a particular industry, etc., in particular localities.

Petitioners' misconception of the proper application of the principle on which they rely is nowhere more apparent than in the intimation (Br., p. 137) that that principle applies with regard to "ordinary injunctions to restrain an officer from taking action said to be contrary to law".[19] The decisions on which we rely (including *Waite* v. *Macy*, *American School of Magnetic Healing* v. *McAnnulty*, *Gegiow* v. *Uhl*, *Work* v. *Louisiana* and *Perkins* v. *Elg*) show conclusively that such is not the case. Petitioners' attempts to dismiss those cases by begging the question,[20] or by suggesting that those cases are unusual and held only that "the error of law" was "so plain as to be beyond the protection of this facet of the rule of ad-

Fe Pac. R. R. Co. v. *Payne*, 259 U. S. 197; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165. *Adams* v. *Nagle*, 303 U. S. 532; (Comptroller of the Currency). The Comptroller must, however, "move within the orbit of the National Banking Act." *Inland Waterways Corporation* v. *Young*, No. 6, this Term. The Postoffice Department cases cited by petitioners (*Public Clearing House* v. *Coyne*, 194 U. S. 497; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106) held only that action of the Department involving questions of law is presumed to be correct, and the latter case specifically excepted action in excess of jurisdiction (194 U. S. at 109). *Houston* v. *St. Louis Ind. Packing Co.*, 249 U. S. 479, held only that the statute there concerned made the officer's decision conclusive on questions of fact.

[19] *Gaines* v. *Thompson*, 7 Wall. 347, relied on by petitioners to support this statement, clearly rested upon the entirely different principle that the courts will not generally intervene in any matter while it is still before an executive officer awaiting the exercise of his official discretion.

[20] As by saying (Br., p. 138) that "if the administrative agency has no jurisdiction to act under the circumstances, the court will not, of course, accept its views as binding."

ministrative finality" (Br., pp. 138-139), require no refutation.[21]

3. Even if the Act were construed to authorize the Secretary of Labor in a proper case to determine a prevailing minimum wage for an area as large as the Thirteen State Area, if in the light of relevant economic facts such a determination should be necessary or appropriate to carry out the purposes of the Act, respondents are entitled to a judicial determination of their claim that the action of the Secretary in this case is beyond her statutory authority because it is arbitrary and in the teeth of the statute.

We have shown elsewhere (see pp. 124-136, *supra*) that, even if the term "locality" as used in Section 1(b) of the Act should be interpreted to confer on the Secretary of Labor the *power* in a proper case to select "localities" as large as those designated in the Determination, the selection as a "locality" of the Thirteen State Area was arbitrary and capricious and therefore, not within such power.

It is well settled that administrative action is unlawful if it is arbitrary and capricious.[22]

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[21] The attempt (Br. p. 138, n. 25) to distinguish cases involving suits against collectors for taxes illegally assessed is unsound. Such suits are, it is true, now held to be statutory in origin, but they were originally non-statutory, and the scope of judicial review is no broader now than it was in early days.

[22] In *Degge* v. *Hitchcock*, 229 U. S. 162, 171, in deciding that certiorari does not lie to review administrative action, the Court said that "had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction

In *Lloyd Sabaudo Societa Anonima Per Azioni* v. *Elting*, 287 U. S. 329, plaintiff brought suit to recover from the Collector of Customs certain fines alleged to have been illegally exacted by the Secretary of Labor. Section 9 of the Immigration Act of 1917 provided for the imposition of fines upon any person "If it shall appear to the satisfaction of the Secretary of Labor" that such person had brought certain diseased aliens into the United States and that the existence of such affliction might have been detected by means of a competent medical examination at the time of foreign embarkation. Here the plaintiff had submitted medical certificates executed by foreign doctors at the time of embarkation. It did not appear that the Secretary of Labor had made available to the medical examiner of the United States the foreign certificates obtained by the plaintiff. The Court held that the fines must be returned on the ground that the Secretary had acted arbitrarily and unfairly.

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conferred, they [the plaintiffs] had the right to apply for and obtain appropriate relief in a court of equity." In *Santa Fe Pac. R. Co.* v. *Payne*, 259 U. S. 197, 199, the statute involved provided that railroads which should surrender certain land grants should be entitled to select in lieu thereof other public lands "of equal value * * *, as may be agreed upon with the Secretary of the Interior." In holding that the Secretary "went beyond the powers conferred upon him by the statute when he took into account [in determining the value of certain lieu lands selected by the plaintiff] facts not known at the time of the selection," and that the plaintiff was "entitled to bring that question into court", the Court said that "it is true that the Secretary had to be satisfied upon that point [the value of the lieu lands], but his discretion was not arbitrary; it went only to the quality of the lands."

See also *Gegiow* v. *Uhl, supra; Kwock Jan Fat* v. *White*, 253 U. S. 454, 464; *Chin Yow* v. *United States*, 208 U. S. 8; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

Petitioners argue, in substance, that, if the Secretary of Labor was not required to hold a hearing before making the Determination, respondents cannot challenge the sufficiency of the evidence on which she acted and, therefore, cannot attack the Determination as arbitrary and capricious (Br., pp. 139-144).

The argument is based upon a mis-conception of respondents' position. In this branch of the case (i. e., the scope of judicial review whether on general equitable principles or under Section 5 of the Act), respondents are not asserting that the Determination is arbitrary and capricious *merely* because the evidence before the Secretary does not support it. On the contrary, respondents maintain that the Determination on its face is arbitrary and capricious, because the sole reason given therein for selecting the Thirteen State Area as a "locality" is, in the light of the admitted facts, a palpably insufficient justification for such action.

Even where an officer or agency has a discretion so broad as to be uncontrollable by the courts, if the officer or agency, in exercising that discretion, reveals that the particular choice was made because of an error in interpreting the applicable statute, the courts will correct the error, if it be challenged as invading legal rights. As Mr. Justice

Holmes said in the passage from *Gegiow* v. *Uhl*, 239 U. S. 3, 9, which we have quoted before:

> "The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the Act."

In *Perkins* v. *Elg*, 307 U. S. 325, 350 (discussed at pp. 258-260, *infra*), the Court, in holding that a declaratory judgment should be given against the Secretary of State, said:

> "The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship."

In *Federal Power Commission* v. *Pacific Power & L. Co.*, 307 U. S. 156, 160, the Court said:

> "The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission."[23]

Petitioners rely largely upon *Adams* v. *Nagle*, 303 U. S. 532. That was a stockholders' class suit to enjoin the enforcement of an assessment ordered by the Comptroller of the Currency of the stockholders of a national bank. The statutes involved,

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[23] See also *Work* v. *Louisiana*, 269 U. S. 250; *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

as construed by the Court, invested the Comptroller with jurisdiction to order an assessment on the shareholders of a national bank "if, upon an investigation, he finds that the assets are insufficient to pay the debts" (303 U. S. at 540). The gravamen of the complaint was that the Comptroller, due to an error of law, had ignored certain assets in finding that the bank's assets were insufficient to pay its debts, and it was, therefore, further contended that he had acted without the scope of his authority and arbitrarily and capriciously in ordering the assessment.

The Court held that the complaint should have been dismissed, ruling that the action of the Comptroller was not arbitrary (at p. 543); and that, at most, he had in a doubtful case "erroneously estimated the value of the bank's assets" (at p. 543) *in exercising the jurisdiction* conferred upon him to find whether or not its assets were sufficient to pay its debts. The Court pointed out that in such a case as that presented, where an administrative officer in enforcing a statute is vested with *a discretion to act* or *not* to act, and is to act "in the light of the facts he ascertains and the *judgment* he forms" (*i.e.*, after his own investigation, but without a hearing), the administrative officer does not exceed his jurisdiction by making a mere "error either of fact or law" in arriving at the very conclusion which he is authorized by law to make (at p. 542). The Court indicated, however, that, even in such a case, if the action of the official was arbitrary in the sense of being in "the teeth of a statute", an injunction would be granted (at p. 543).

The *Yagle* case plainly stands for no such proposition as that for which petitioners cite it.[24]

In fact, that case recognizes that even action taken by a public official such as the Comptroller of the Currency, pursuant to a statute authorizing him to take action after a mere finding (made without hearing) representing, in effect, his judgment, may be enjoined if "arbitrary" in the sense of being in the "teeth of the statute". Consequently, even if the Secretary of Labor, under her construction of the Act, could be said to occupy a position similar to the Comptroller, the complaint herein states a cause of action, since the Determination is "in the teeth" of the Public Contracts Act.

But, under the Public Contracts Act, even as construed by petitioners, the Secretary of Labor does not occupy a position or perform a function similar to that of the Comptroller. She does not make a finding, representing, in substance, her judgment, and on the basis of the judgment thus formed take or refrain from action the propriety or necessity of which depends on such judgment. Her function is to determine prevailing minimum wages in localities, and to enforce her determinations in various ways. As petitioners themselves insist, such determinations are "quasi-legislative determinations" *of ultimate facts*. They constitute steps in a statutory plan to regulate members of a particular class,—viz., government contractors.

Petitioners also rely (Br., pp. 142-143) on *Pa-*

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[24] It may be noted parenthetically that the case affords no support for the contention of petitioners, which we have already discussed (pp. 226-230, *supra*), that the Secretary has a discretion *to determine her jurisdiction* under the Act by construing the term "locality" as employed therein.

cific States Co. v. *White*, 296 U. S. 176, 185. That case merely applied the well-settled rule that facts relied upon to rebut the presumption of constitutionality must be specifically set forth in a complaint attacking the constitutionality, under the due process clause, of an attempted exercise of the police power of a State. If that rule be considered applicable in this case, respondents have certainly complied therewith.

Insofar as we know, it has never been contended before now (and it has certainly not been held by this Court) that any presumption of constitutionality can be based on a "conceived state of facts" when the actual facts presently known are contradictory of any facts that could be "conceived" as supporting the action in question.

The similar authorities cited by petitioners (Br., p. 142) are equally inapplicable in this case.[25]

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[25] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, held that the Tariff Commission, whose function was to assist and *advise* the President, was not required to hold "judicial" hearings in securing information. Mr. Justice Cardozo, however, carefully distinguished (at p. 318) between a body "with power to ordain" [such as the Secretary of Labor in this case] and one "which merely investigates and advises". *Buttfield* v. *Stranahan*, 192 U. S. 470, upheld the constitutionality of the statute setting up the "tea board" which was involved in *Waite* v. *Macy*, 246 U. S. 606. Insofar as the *dicta* at p. 497 of 192 U. S. might indicate that the exercise of the statutory authority to establish standards was not subject to judicial control in the absence of bad faith or malice, *Waite* v. *Macy* held to the contrary. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14-15; *Monongahela Bridge* v. *United States*, 216 U. S. 177, 195; and *The Philadelphia & Trenton R. R. Co.* v. *Stimpson*, 14 Pet. 448, 458, aid petitioners only to the extent of stating that an officer is presumed properly to perform his duties until the contrary is shown. *Martin* v. *Mott*, 12 Wheat. 19, 30, held that the obvious intent of

As previously mentioned, our discussion thus far under this Point IX has been directed to the scope of the judicial review available in this case, whether such review be considered as that contemplated by Section 5 of the Act or as that available on general principles in the absence of a specific provision in the Act prohibiting such review. In that discussion we have made it clear that respondents are entitled to have the Court determine whether petitioners have acted within their statutory jurisdiction and authority and whether, even if they have kept within the strict limits of the power conferred by the Act, they have nevertheless exercised that power in an arbitrary and capricious manner.

If the Determination was required by Section 5 of the Act to be made after a hearing (as respondents have previously shown), the nature of the review available in this action is that outlined by this Court in *Shields* v. *Utah Idaho R. R. Co.*, 305 U. S. 177. In that case, it was pointed out that the scope of judicial review involves the determination of the question whether the administrative body or officer has acted within its authority. This involves, among other things, consideration of whether (1) the hearing required by law was accorded, (2) the administrative officer or agency in arriving at its determination departed from the applicable rules of law, (3) the determination was supported by the findings, and (4) the determination was arbitrary and capricious (305 U. S. at 185, 187).

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a statute authorizing the President to call out the militia whenever the United States shall be invaded or be in imminent danger of invasion was to make the President the sole and final judge of the necessity for acting thereunder.

X

Petitioners may not claim for themselves the immunity of the United States from suit and thereby prevent respondents from maintaining this action.

A. This suit is within the general rule that a public officer charged with injuring private rights by action in excess of his authority may not shelter himself behind the immunity of the sovereign.

The decision below in no way conflicts with the rule that the United States may not be sued, without its consent, either directly or in an action nominally against a public officer, but in which the decree sought would have the effect of one entered in a suit brought directly against it.[1]

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[1] *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. The Court will assume that the allegations of the complaint have been proven and will then, on the basis of the assumption, decide whether the United States is a necessary party in view of the manner in which its interests would be "affected" by the decree sought. *Ickes* v. *Fox*, 300 U. S. 82, 96; *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135, 152. The problems involved are similar to those arising when the defense of the Eleventh Amendment is raised, and cases in one field are authorities in the other. See *Minnesota* v. *Hitchcock*, *supra*, at 387; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636, 646. In considering whether the relief sought in a particular suit is of such a nature, the Court is not inclined to extend the application of the doctrine of sovereign immunity. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 391, and *Federal Housing Administration* v. *Burr*, . . . U. S. . . ., 60 Sup. Ct. 488.

The principle has long been established [2] that a suit against a public officer is not one against the sovereign, where, as here, the gravamen is invasion or threatened invasion of the legal rights of the complainant by affirmative action in excess of the officer's authority and the real object is an injunction restraining or undoing such action.

The reason is clear. The acts of public officials must be justified by authority conferred by law.[3] When, therefore, an official takes or threatens affirmative action in excess of his authority which invades or will invade the legal right of another, his act is personal in nature and derives no official justification from being done in asserted agency

[2] *Osborn* v. *The Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 83 U. S. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Ex parte Tyler*, 149 U. S. 164; *Scranton* v. *Wheeler*, 179 U. S. 141; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Ex parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *Colorado* v. *Toll*, 268 U. S. 228; *Ickes* v. *Fox*, 300 U. S. 82.

[3] "The acts of all of its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108. "A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. * * * It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act." *Poindexter* v. *Greenhow*, 114 U. S. 270, 288. "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law." *Marbury* v. *Madison*, 1 Cranch 137, 170.

for the United States.[4] Consequently, a decree in a suit brought to defend against such invasion, actual or threatened, and which merely enjoins, or compels the official to undo, such personal action, does not affect the United States.

In *Philadelphia Company* v. *Stimson*, 223 U. S. 605, an action was brought in the Supreme Court of the District of Columbia to set aside certain harbor lines established by the Secretary of War and to enjoin him from causing criminal proceedings to be instituted by the District Attorney against the complainant because of its intended reclamation and occupation of lands outside of such harbor lines. Under the statutes involved, the Secretary of War was given authority to establish harbor lines "where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors." Such statutes made the violation of harbor lines so established a misdemeanor and made it the duty of district attorneys of the United States to prosecute all offenders "whenever requested by the Secretary of War".

The Secretary of War demurred on the ground, among others, that the suit was "virtually" one against the United States. The Court, in overruling that contention, stated as follows the rule which governs this case (619-620):

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. [Citing cases.] And in case of an injury threatened by his illegal action, the officer cannot claim immu-

[4] *Goltra* v. *Weeks*, 271 U. S. 536, 544.

nity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. [Citing *Ex parte Young*, 209 U. S. 123, and other cases.] *And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.* [Citing cases.]

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. *The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.*" [Italics added.]

Many, if not most, of the occasions for the application of these principles have arisen in cases involving actions by public officials who asserted that they were carrying on the "general" or "basic activities" of government in fields not generally considered to be "regulatory" in character. (Br., pp. 73, 80). Illustrative of suits held not to be against the United States (or a State) are suits to enjoin the Secretary of the Interior from requiring a land claimant to comply with an allegedly unauthorized condition prior to consideration of a claim to public lands;[5] to dispossess military officers occupying, for army purposes and under claim of title in the United States, property alleged to belong to the plaintiff;[6] to prevent the allegedly unauthorized fixing by a Federal officer of charges

[5] *Work* v. *Louisiana*, 269 U. S. 250. See also *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

[6] *United States* v. *Lee*, 106 U. S. 196. See also *Tindal* v. *Wesley*, 167 U. S. 204.

of railroads in the possession and control of, and whose revenues belonged to, the United States under the war power;[7] to enjoin repossession of boats in alleged violation of a lease thereof by the United States;[8] and to enjoin a levy upon property, or to restore property taken to satisfy a state tax in alleged impairment of contract.[9]

Work v. *Louisiana*, 269 U. S. 250, involved certain Acts of Congress which granted to the State of Louisiana the "swamp and overflowed lands" within its borders and provided, in substance, that it should acquire title thereto upon the approval by the Secretary of the Interior of a list describing such lands.

While proceedings for the approval by the Secretary of a list of certain lands were pending, such lands were included in a petroleum withdrawal made by Presidential order under another Act of Congress. The Secretary thereafter ruled that mineral lands did not inure to the State under the swamp land grants, that the lands in question had been impressed with a *prima facie* mineral character by the withdrawal order and that the State must prove their non-mineral character before he would undertake to decide whether such lands were otherwise "swamp and overflowed".

The State thereupon filed its bill in equity, alleging that the Secretary had exceeded his authority and jurisdiction in making such ruling and imposing such requirement and praying that he

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[7] *No. Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135. See also *Dakota Cent. Telephone Co.* v. *South Dakota*, 250 U. S. 163.

[8] *Goltra* v. *Weeks*, 271 U. S. 536.

[9] *Allen* v. *B. & O. R. Co.*, 114 U. S. 311. See also *Poindexter* v. *Greenhow*, 114 U. S. 270.

be enjoined from taking further action to enforce the ruling and be required to vacate it and set it aside.

The Secretary urged that the Court was without jurisdiction to entertain the bill, upon the grounds, first, that it was prematurely brought before the Secretary had exercised his jurisdiction to determine the character of the land, and, second, that the United States was an indispensable party. This Court rejected both contentions.

As to the first, the Court pointed out (269 U. S. at 254) that the State did not seek an adjudication that the lands in question were swamp and overflowed lands but sought *merely* to restrain the Secretary from rejecting its claim upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that such lands were non-mineral in character.

As to the second contention, the Court said (*ibid.*):

> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. * * * A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not an indispensable party."

The Court then held that the Acts of Congress under consideration had granted swamp and overflowed lands whether or not mineral in character. Therefore, in requiring the State to establish their non-mineral character, the Secretary had "exceeded the authority conferred upon him by the Acts and attached this condition to the prosecution

of the claim of the State without warrant of law" (269 U. S. at 260). Because the State had not as yet finally established its title to such lands and "the administrative processess necessary thereto" were not complete, the Court modified the decree below so as to strike therefrom a clause which in effect would have restrained the Secretary from determining whether such lands were in fact swamp and overflowed.[10]

Petitioners attempt to distinguish *Work* v. *Louisiana, supra*, upon the ground (Br., p. 85) that title, use and possession of the swamp lands were not affected thereby—that the relief granted "may have changed the action of the Secretary, but it did not change the position of the United States or affect its interest". It is true that the relief granted did not change the position of the United States or affect its interests within the meaning of the immunity rule. The reason, however, was that, upon examination of the law, the Court found that *Congress had not imposed or authorized to be imposed* (although the Secretary of the Interior was attempting to impose), as a condition to consideration of the State's claim to public lands, the requirement that such lands be shown to be non-mineral. Just so, the relief sought

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[10] In *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492, the Secretary of the Interior was enjoined from insisting upon or giving effect to a demand that the grantee of a railroad land grant make an advance deposit to cover the entire cost of surveying a township in which such grantee was entitled to the odd-numbered sections after they should have been surveyed. The Court held that the Secretary had "plainly exceeded his authority" and could be enjoined from enforcing his demand since it was "an unauthorized act, done under color of office". (244 U. S. at 497.)

in this suit will not affect the position or interests of the United States if, upon examination of the law, the Court finds that *Congress has not imposed or authorized to be imposed* upon bidders for Government contracts the condition which petitioners are seeking to impose.

The petitioners in this suit may not prevent the Court from examining into the legality of their acts any more than the defendants in *Work* v. *Louisiana* were able to prevent examination of the legality of theirs.

B. The relief sought in this suit will not compel the United States either to fix the terms of Government contracts or specifically to perform them; nor will it deprive the United States of the title to or use of its property.

Petitioners assert that a suit for an injunction or mandamus specifically to enforce a contract of the United States is a suit against the United States, and that consequently the present suit is likewise one against the United States since the effect of the relief sought is to compel the United States to fix the terms and conditions of its contracts (Br., p. 76).[11]

But this is a *non sequitur*.[12] Respondents are

[11] Petitioners state that the "same logic" has prevailed in several State cases which they cite (Br., p. 78), but none of which is in point.

[12] Moreover, the argument, at its best, is only an attempt to obliterate the distinction, on which this Court has always insisted, between the compelling and enjoining of action. The distinction is pointed by a comparison of *Hagood* v. *Southern*, 117 U. S. 52, and *United States ex rel. Shoshone Irrigation District* v. *Ickes*, 70 Fed. (2d) 771 with *Goltra* v. *Weeks*, 271 U. S. 536, and *Pennoyer* v. *McConnaughy*, 140 U. S. 1, and of *State of North Carolina* v. *Temple*, 134 U. S. 22, with *Humphrey* v. *Pegues*, 83 U. S. 244.

not seeking to compel the United States to do anything, directly or indirectly. They are merely trying to prevent *petitioners* from imposing, under color of office, conditions in Government contracts which Congress has not authorized and the imposition of which is, indeed, contrary to the statutes of the United States. Far from attempting to compel the United States to fix the terms and conditions of its contracts, respondents are trying to prevent the insertion in such contracts of terms and conditions which the United States, speaking through Congress, has declared should not be included therein.

It is thus evident that, even if the cases relied on by petitioners do hold that a suit for an injunction or mandamus specifically to enforce a contract of the United States is a suit against the United States,[13] such cases, nevertheless, have no relevancy here.

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[13] It is by no means clear that such cases (Br., pp. 76-77, n. 63, 64) do so hold. They probably hold only that where the gravamen of a complaint is that the action of an individual defendant has been or will be a wrong in that it is or will be a breach by the United States of a contractual obligation, and it does not appear that such defendant has exceeded, or threatens to exceed, his statutory authority, the suit is one against the sovereign. Thus, *Wells* v. *Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 Fed. (2d) 288, and *Johnstown Coal & Coke Co.* v. *Wilson*, 60 Fed. (2d) 557, involved attempts to restrain or control the acts of administrative officials *within the scope of their authority* (see opinion below, R. 396, n. 61, 64). There is a distinction, it is submitted, between lack of statutory authority and presence of statutory, but unconstitutional, authority. In the latter case, it seems apparent that a suit which seeks to enforce a contract which the sovereign has attempted to annul by an unconstitutional statute is a suit against the sovereign. Even in

Equally as inapplicable as such contract cases are the cases cited by petitioners (Br., p. 78, n. 65, 66) to the effect that a suit which seeks to deprive the United States of the title to or the use of its property may not be maintained.[14] Obviously, respondents are not attempting to deprive the United States of the title to or the use of its property and petitioners apparently so concede (Br., p. 78).

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such a case, however, this Court has gone far in permitting practical but indirect enforcement. See, for example, *Poindexter* v. *Greenhow*, 114 U. S. 270 (detinue will lie to recover property taken to pay a tax, the tax collector having caused a breach of a State's contract by refusing to accept bond coupons in payment of such tax); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (state land commissioners enjoined from selling land after state statute purported to cancel plaintiff's contract of purchase); and *Wright* v. *Georgia R. and B. Co.*, 216 U. S. 420 (officials enjoined from enforcing tax levied in breach of contract not to tax). Where, however, there is no constitutional question, it seems that an officer might, in a proper case, either be ordered to perform a contract, by analogy to cases such as *Miguel* v. *McCarl*, 291 U S. 442; *Houston* v. *Ormes*, 252 U. S. 469; and *Mellon v. Orinoco Iron Co.*, 266 U. S. 121; or be enjoined from causing a breach thereof, since the writs of injunction and mandamus are sometimes correlative, *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 171-172. It is true that a "proper case" would probably rarely arise, since in the normal run of things an executive officer has, by virtue of his general powers, a discretion (uncontrollable by the courts) to see that the United States either performs a contract or breaches it, being then subject to suit in the Court of Claims.

[14] It may be noted, however, that (probably because of the general antipathy for the doctrine of sovereign immunity) the exception stated in the text is rather narrowly confined. For example, compare *United States* v. *Lee*, 106 U. S. 196, with *Stanley* v. *Schwalby*, 162 U. S. 255, and *Houston* v. *Ormes*, 252 U. S. 469, with *Goldberg* v. *Daniels*, 231 U. S. 218.

C. The relief sought in this suit will not interfere with the general activities of the United States.

Petitioners virtually repeat their argument in their broad contention (Br., pp. 79-80) that the relief sought by the respondents constitutes interference with the general activities of the United States.

This argument stands on the same legal footing as that which we have already answered. The relief sought herein will in no sense interfere with the general activities of the United States. It seeks only to restrain the illegal action of petitioners taken or threatened to be taken in violation of the acts of Congress.

And from a practical standpoint the argument is repudiated by the recorded experience (pp. 191-192, *supra*) of Government contracting agencies since the granting of the temporary relief sought in the complaint.

Respondents place chief reliance on the case of *Louisiana* v. *McAdoo*, 234 U. S. 627. In that case, wherein the plaintiff sought to make the defendant, in the name of the United States, collect taxes, there could be no thought that the defendant was being sued as an individual in a "defensive" suit to prevent (or compel the retraction of) action taken in excess of statutory authority.[15] On the contrary, the opinion clearly shows that the Court regarded the suit as one wherein the plaintiff sought to compel the defendant, in the name of the United States, to collect a tax. The suit really

[15] Petitioners, in another portion of their brief (Br., p. 29), seem to suggest that the case really rests on the same basis as *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and we are not inclined to disagree with that suggestion.

was in the nature of a mandamus, and the decision seems more properly placed on the second ground stated by the Court (and in which alone Mr. Justice McKenna concurred), namely, that the duties imposed on the Secretary of the Treasury by the statutes in question were not ministerial, and that therefore mandamus would not lie.[16]

That *Louisiana* v. *McAdoo* does not lay down any such broad and indefinite rules as petitioners claim is evident from the fact that cases challenging the validity of far-reaching taxing programs [17] have not been thought to be barred by the rule of sovereign immunity.[18] Nor have suits involving the extent of the power of officials managing properties taken over by the United States under its war powers [19] or suits questioning acts of officials in administering the public lands [20] and public irrigation projects.[21]

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[16] It seems, indeed, that the jurisdictional question of sovereign immunity has no proper place in mandamus actions or their modern equivalent under the Rules of Civil Procedure. Inasmuch as the theory on which a writ of mandamus (or decree of like effect) is granted must be that the sovereign is thereby compelling its officer to do his duty, the only issue should be whether the command of the sovereign is plain and unmistakable.

[17] As is indicated by petitioners (Br., p. 70), it is as necessary for the United States to tax as for it to buy and to contract.

[18] See, e.g., *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

[19] *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135; *Dakota Cent. Telephone Co.* v. *State of South Dakota*, 250 U. S. 163; *Burleson* v. *Dempcy*, 250 U. S. 191.

[20] *Work* v. *Louisiana*, 269 U. S. 250; *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

[21] *Ickes* v. *Fox*, 300 U. S. 82; *Ickes* v. *Virginia-Colorado Development Corporation*, 295 U. S. 639.

In any event, even if *Louisiana* v. *McAdoo* established any test as indefinite as "serious interference with the general activities of the Government", the instant suit is not thereby barred, because, as stated above, it seeks only to interfere with the activities of *petitioners*. Since those activities are in violation of law, petitioners in carrying them on are not the Government, but merely individuals purporting to act as the Government, and interference with their activities is consequently not interference with the activities of the Government. On the contrary, the injunction sought in this suit would prevent petitioners from unlawfully interfering with the purchasing functions of the Government. It comes with poor grace from petitioners, therefore, to seek, as they do here, to avoid an inquiry of the merits, because, as they contend, such an inquiry may in some vague and undefined way interfere with the activities of the Government.

D. Since the acts of petitioners of which respondents complain are unauthorized by law and invade respondents' rights, it is immaterial whether such acts involve "regulatory" or "non-regulatory" functions, as in either case this suit is not one against the United States.

Petitioners concede that a suit which seeks to restrain an unauthorized regulation by a public officer is not a suit against the United States but only against the officer who has exceeded his authority (Br., p. 73).

Petitioners, however, contend that their actions challenged in this suit are not "regulatory" and

that, therefore, the cases relied on by respondents are not applicable here.

The reason advanced by petitioners for this distinction is that, although the United States may be supposed to have no interest in the enforcement of an invalid "regulation", it does have an interest in its property or contracts which would be affected by the restraint of acts relating thereto, even though illegal. (Br., p. 82).[22]

We have already shown that many, if not most, of the occasions for the application of the principle asserted by respondents in this action have arisen in cases involving action by public officials who asserted that they were carrying on the necessary functions of Government in fields not generally considered to be regulatory in character.[23] The obvious reason why that principle has been applied on those occasions as well as others is that, if the rights of a private person are invaded by action taken by a public official in excess of the authority and jurisdiction conferred on him by law, the injury is none the less real because such official claims that he is carrying on the business of the Government.

Petitioners, moreover, do not attempt to pursue

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[22] Petitioners' argument presupposes that their illegal action is not "regulatory" in character. The Public Contracts Act, however, does not seek, in its wage provisions, to further any "proprietary" interest of the United States. On the contrary, it seeks to regulate a particular class of persons, i.e., Government contractors, with respect to the wages paid to their employees engaged in the performance of Government contracts.

[23] Cases cited in notes 5-9, 242-243, *supra*. Of the six cases cited by petitioners (Br., p. 81, n. 67) as involving "solely the regulatory functions", three concerned action

the distinction which they suggest between regulatory and non-regulatory functions. They admit that suits to restrain the affirmative acts of public officers taken in excess of their authority and which invade the legal rights of others have been maintained although the "property interests of the Government were to some extent involved" (Br., p. 83).[24] This reluctant admission makes evident the difficulties into which petitioners are led by their argument that the principle asserted by respondents is only applicable in a "regulatory" field; and those difficulties are made more apparent by their futile attempt to explain the cases which support respondents' position.

Petitioners' failure successfully to distinguish *Work* v. *Louisiana* has already been noted (p. 245, *supra.*). They also fail to shake respondents' position by intimating (Br., p. 86) that the part of the opinion in *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135, which embarrasses them is dictum[25]; and their suggestion (Br., p.

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in fields not generally considered to be regulatory in character. *Waite* v. *Macy*, 246 U. S. 606 (importing); *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94 (postoffice); and *Gegiow* v. *Uhl*, 239 U. S. 3 (immigration).

[24] *United States* v. *Lee*, 106 U. S. 196; *Work* v. *Louisiana*, 269 U. S. 250; *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492; *Lane* v. *Watts*, 234 U. S. 525; *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135; *Ickes* v. *Fox*, 300 U. S. 82; and other cases.

[25] *Northern Pac. Ry. Co.* v. *State of North Dakota*, *supra*, was a suit against the Director General of Railroads, it being alleged that he had exceeded his statutory authority in fixing charges for the railroads the possession and control of which had been taken over by, and the revenues of which inured to, the United States under its war powers. The Court referred to *Louisiana* v.

87) that a State may have what is in effect a "special right" to sue the United States is unsupported by authority and unsound on principle.

Petitioners say, in substance, that *Lane* v. *Watts*, 234 U. S. 525, and *Ickes* v. *Fox*, 300 U. S. 82, did not affect any interests of the United States because in each of those cases the Court found on the merits [26] that the defendant's claim of statutory authority was unsound (Br., p. 86). Such alleged distinctions can mean only that petitioners maintain the untenable proposition that the interests of the United States will be affected if its agents are prohibited from inserting in its contracts provisions which it does not want inserted therein.

Again, petitioners say (somewhat inconsistently) that *Colorado* v. *Toll*, 268 U. S. 228, is not in point because, since the State there asserted that the United States did not have certain rights, a determination that such assertion was correct would necessarily prevent an injunction from affecting United States property. It is, we submit, equally obvious that a decision that respondents herein are correct in their assertion of the invalidity of petitioners' actions would necessarily prevent any injunction herein from affecting the United States.

It is thus abundantly clear that the present ac-

McAdoo, 234 U. S. 627, and other cases relied on by petitioners, but held that the suit was not one against the United States, because the principle of those cases could only be applied by giving effect to the conclusion reached by the Court as to the legality of the defendant's acts and "to decide [that] question the United States was not a necessary party" (250 U. S. at 152).

[26] The opinion in *Ickes* v. *Fox* seems clearly to show (300 U. S. at 96) that the jurisdictional question was decided in the usual way, i.e., upon an assumption that the allegations of the complaint could be proven.

tion falls within the principle long established that a suit against a public officer is not one against the sovereign where the gravamen is invasion or threatened invasion of the legal rights of the complainant by affirmative action in excess of the officer's authority and the real object is an injunction restraining or undoing such action; and that, accordingly, petitioners may not shelter themselves under the immunity of the United States and thereby prevent respondents from maintaining this action.

XI.

The complaint clearly sets forth facts sufficient to entitle respondents to injunctive relief.

Petitioners contend that, even though this is not a suit against the United States and even though respondents have a standing to maintain the action, respondents are not entitled to injunctive relief, because they do not allege that, if permitted to bid upon the proposed contracts described in the complaint free of the unlawful Determination, they would be awarded such contracts, and that, if awarded such contracts, they would realize a profit therefrom which they could not realize elsewhere (Br., pp. 87-90).

The facts set forth in the complaint, showing the threatened unlawful invasion of respondents' rights and the immediate and irreparable injury that would result therefrom unless the injunctive relief prayed were granted, are summarized at pages 24 to 28 hereof.

Here again (see p. , *supra*) petitioners confuse the measure of proof necessary to show the amount of damages recoverable in an action at law with the probability of injury required to be shown in order to establish a need for injunctive relief.

In a suit for injunctive relief to prevent unlawful interference with business relations or prospective customers, it has never been supposed that the plaintiff must show of a certainty that, except for the unlawful interference, the business relations would ripen into profitable contracts or the prospective customers would become certain purchasers at profitable prices. By the very nature of the case it is sufficient that the plaintiff show

no more than a reasonable probability of irreparable injury from the unlawful interference.

It is the unlawful interference with the *opportunity* to carry on business that constitutes the gravamen of the wrong threatened by petitioners.[1] It must necessarily be inferred, on the basis of human experience, that if that opportunity be interfered with damage will result. No one, of course, can ever do more than to establish the *probability* of what he will be able to do in the future.

The complaint here alleges facts sufficient to show that, if respondents could bid for such contracts free of the restrictions imposed by the unlawful Determination, they would, in the normal course of events, probably be the lowest bidders on, and be awarded, substantial amounts thereof. That is the necessary inference from the past experience of respondents in bidding on and obtaining Government contracts, which have been substantial in amount and profitable.[2]

Since petitioners have not attempted to argue in this Court that respondents had any plain and adequate remedy other than a suit for injunctive relief, we content ourselves with referring to the allegations in the complaint (R. 33-38, 316-317) and to the full discussion of that point in the opinion of the court below (R. 400-404).

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[1] See *Traux* v. *Raich*, 239 U. S. 33, and *Pierce* v. *Society of Sisters*, 268 U. S. 510. Unlawful interference with an opportunity for a prize or gratuity will support an action for damages. Restatement of Torts (1939) § 912 f; *Keeble* v. *Hickeringill*, 11 East 574 (K. B.).

[2] This probability based upon past experience is confirmed by the public records of petitioner Perkins herself, which show that, since the granting of the injunction by the court below, various respondents have received substantial amounts of Government contracts (see p. 24, *supra*).

XII.

The court below correctly held that respondents are entitled to a declaratory judgment declaring the invalidity of the determination.

Even if this Court should hold that respondents have not made a sufficient showing of irreparable injury to entitle them to the injunctive relief awarded them by the court below, there can be no doubt that they are nevertheless entitled to a declaratory judgment[1] under the Declaratory Judgment Act.[2]

This is fully supported by the recent decision in *Perkins* v. *Elg*, 307 U. S. 325. In that case a person who had been born in this country of naturalized parents was threatened with deportation by the Secretary of Labor and the Commissioner of Immigration on the ground that she was not a citizen of the United States because of her removal during minority to her parents' homeland. For the same reason the Secretary of State refused her application for an American passport. She sought a declaratory judgment that she was a citizen of the United States,

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[1] "As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264. See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241.

[2] Section 274(d) of the Judicial Code, 28 U. S. C. § 400. Petitioners have not attempted to deny, and, indeed, they apparently concede (Br., pp. 153-154), that there exists in this case an "actual controversy" within the meaning of that Act.

an injunction against the Secretary of Labor and the Commissioner of Immigration restraining them from proceeding with her deportation, and an injunction against the Secretary of State from refusing to issue to her a passport upon the ground that she was not a citizen.

Upon motion, the District Court dismissed the complaint as to the Secretary of State, because of his official discretion in the issue of passports, but refused to do so as to the Secretary of Labor and the Commissioner of Immigration, and entered a decree declaring the plaintiff to be a citizen of the United States. The Court of Appeals affirmed the decree. This Court, however, modified the decree so as to strike out the portion dismissing the bill of complaint as to the Secretary of State and so as to include him in the declaratory provision of the decree, saying (307 U. S. at 349-350):

> "The dismissal [as to the Secretary of State] was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg 'solely on the ground that she had lost her native born American citizenship'. The court below, properly recognizing the existence of an actual controversy with the defendants (Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000), declared Miss Elg 'to be a natural born citizen of the United States' (99 F. 2d 414) and we think that the decree should include the Secretary of State as well

> as the other defendants. *The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.*" [Italics ours.]

The similarity of the *Elg* case to the instant one is apparent, since respondents here seek a judicial declaration that will preclude the rejection of their bids, without consideration, for an unlawful reason, but which does not seek to control the discretion of petitioners.

Smith-Brooks Printing Co. v. *Young*, 103 Colo. 199, 85 Pac. (2d) 39, is an authority almost squarely in point for the granting of a declaratory judgment in this case. In that action, brought under the Uniform Declaratory Judgments Act,[3] a prospective bidder on State printing contracts to be let to the lowest responsible bidder secured a declaratory judgment as to the validity of the action of the Colorado Industrial Commission in determining the prevailing rate of wages to be paid to employees engaged on such contracts, and as to the validity of the statute under which said Commission had made such determination.[4]

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[3] Colorado Laws 1923, p. 268. Colorado courts require the existence of a controversy, just as it is a prerequisite of federal jurisdiction. *Denver* v. *Lynch*, 92 Colo. 102, 18 Pac. (2d) 907; *Gabriel* v. *Bd. of Regents*, 83 Colo. 582, 267 Pac. 407.

[4] See also *Currin* v. *Wallace*, 306 U. S. 1, and *United States* v. *Farley*, 18 F. Supp. 75 (D. C., D. of Col.) [proceeding for judgment declaring plaintiff's classification status as a postal employee].

Professor Borchard has described declaratory judgments as being peculiarly appropriate in the determination of questions of administrative law: [5]

> "Possibly in no branch of litigation has the declaratory procedure proved more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasion of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly on questions of law, involving the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand and public right and power on the other, makes this field of controversy peculiarly susceptible to the expeditious and pacifying administrations of the declaratory judgment."

The discretion entrusted to the courts with respect to the granting of relief under the De-

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[5] Borchard, Declaratory Judgments 1939, 9 Brooklyn L. Rev. 1, 22. See *Quinones* v. *Landron*, 99 Fed. (2d) 618, 620 (C. C. A. 1st): "There can be no doubt that one of the benefits contemplated by the Uniform Declaratory Judgment Act was the opportunity afforded to settle disputes arising over the powers, duties and privileges of administrative officers, especially if the disagreement involved the construction of a statute." It has also been pointed out that the construction of statutes is not weighted with the acute social and political questions which inhere in many constitutional controversies, and that consequently the propriety of declaratory relief should not present any particular difficulties. Moore's Federal Practice (1939), § 57.03, p. 3221.

claratory Judgment Act is one which should be exercised with a view to affording a speedy determination of legal rights without the necessity of awaiting an actual disturbance of relationships.[6]

Petitioners urge (Br., p. 155) that "a proper regard for the public interest in this controversy requires the conclusion that the contracting and purchasing functions of the Government be not subjected to interference at the suit of prospective bidders". We believe, and have shown (pp. 256-257, *supra*), that petitioners' so-called practical arguments against the granting of injunctive relief in this action are of little merit. Such arguments are of even less merit when addressed to the granting of a declaratory judgment.

It is evident that a suit for such a judgment cannot interfere with any contracting officer. If, as in this case, the dispute is one of principle, involving a question of law as to whether certain actions are beyond the jurisdiction and authority of the officials involved, a declaratory judgment will merely declare the law for the future—which, as

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[6] *Aetna Casualty & Surety Co.* v. *Quarles*, 92 Fed. (2d) 321, 325 (C. C. A. 4th); *Ohio Casualty Ins. Co.* v. *Marr*, 98 Fed. (2d) 973, 975 (C. C. A. 10th). Relief in an otherwise appropriate case should be denied only when it will not finally settle the rights of the parties, or if the issues are already involved in other litigation. *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 Fed. (2d) 514, 515 (C. C. A. 3rd). The report of the Committee which reported to the Senate the bill which became the Declaratory Judgment Act (Rept. No. 1005, 73rd Cong., 1st Sess.) stated that the declaratory judgment procedure "has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, *or abandon one's rights because of a fear of incurring damages.*" [Italics ours.]

petitioners say (Br., p. 154), is all that is required. The discretion of the officials will not be invaded by such a judgment any more than it was in *Perkins* v. *Elg*, *supra*, or in *Work* v. *Louisiana*, pp. 243-245, *supra*.

We do not believe, and we do not think that this Court will believe, that the contracting and purchasing functions of the Government will be improperly hampered, any more than the Government's functions of issuing passports and administering the public lands were improperly hampered in the two cases last cited, by a judicial declaration that certain allegedly official actions are entirely beyond the scope of the authority which Congress has conferred on the officers involved.

CONCLUSION

It is evident for the foregoing reasons that the decision of the court below should be affirmed.

Respectfully submitted,

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